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THE
ALL INDIA REPORTER

1946

[Vol. 33]

LAHORE SECTION

WITH PARALLEL REFERENCES TO

- (1) I. L. R. (1946) LAHORE (2) 48 PUNJAB LAW REPORTER
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LAHORE HIGH COURT

1946

CHIEF JUSTICES :

The Hon'ble Sir Arthur Trevor Harries, KT., B.A., LL.B. (*Cantab*), Bar-at-law.
" " Mian Abdul Rashid, KT., M.A. (*Cantab*), Bar-at-law.

PUISNE JUDGES :

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" Diwan Ram Lal, B.A. (*Oxon*), Bar-at-law.
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AIR	Other Journals	AIR	Other Journals	AIR	Other Journals	AIR	Other Journals
142FBILR (1946) L	147	76FBILR (1946) L	751	238con 47 Cr L J	516	293 47 Cr L J	277
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A I R 1945 Lahore		48 Cr L J	57	274 ILR (1946) L	71	313FBILR (1946) L	16
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A. I. R. (33) 1946 Lahore = Other Journals

AIR 1946 Lahore		AIR 1946 Lahore		AIR 1946 Lahore		AIR 1946 Lahore	
AIR	Other Journals	AIR	Other Journals	AIR	Other Journals	AIR	Other Journals
1FB47 P L R	351	16FBcon 223 I C	243	26con 223 I C	137	36con 47 Cr L J	212
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222 I C	406	223 I C	120	33 221 I C	556	47 222 I C	62
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AIR 1946 Lahore			AIR 1946 Lahore			AIR 1946 Lahore			AIR 1946 Lahore		
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50	221 I C	655	142con 225 I C	602		268	222 I C	22	353con ILR (1946) L	580	
54FB48	P L R	35	FB ILR (1946) L	467		272	222 I C	162	380 48 P L R	86	
	224 I C	199	147FB1946-14 I T R	152			48 P L R	45		226 I C	521
	47 Cr L J	561		225 I C	73	275	48 P L R	39		47 Cr L J	980
	ILR (1946) L	284	158FB224 I C	608			226 I C	29	387	48 P L R	195
57FB47	P L R	378		47 Cr L J	645		47 Cr L J	810		224 I C	117
	ILR (1945) L	281	177 46 P L R	382		277	48 P L R	13	394FB226 I C	310	
	223 I C	284		230 I C	27		226 I C	120		ILR (1946) L	788
62	222 I C	8	180FB223 I C	20		278	48 P L R	26	399FB48 P L R	141	
64	222 I C	13		48 P L R	210		225 I C	567		227 I C	340
65FB47	P L R	391	193 48 P L R	1			47 Cr L J	747	406	48 P L R	77
	223 I C	579		225 I C	362	280FB48	P L R	250		227 I C	488
73	47 P L R	385	199 ILR(1945) L	408			226 I C	5		48 Cr L J	136
	223 I C	458		48 P L R	515		ILR (1947) L	47	413	48 P L R	102
78	47 P L R	411		227 I C	375	298	48 P L R	176		223 I C	152
	223 I C	623	200 48 Cr L J	62			226 I C	84	414	48 P L R	100
81	47 P L R	402		ILR (1945) L	554		47 Cr L J	826		223 I C	116
	223 I C	353		228 I C	100	301FBILR (1946) L	173	416	48 P L R	138	
82	47 P L R	407	216 48 P L R	8			226 I C	70		223 I C	300
	223 I C	398	220 48 P L R	16		305	47 Cr L J	818	418	223 I C	130
85	47 P L R	94		225 I C	169		48 P L R	104	419	223 I C	417
	224 I C	322		ILR (1946) L	561	306	227 I C	566		48 P L R	205
94FB47	P L R	436	222 48 P L R	106		309	222 I C	107	424	48 P L R	64
	224 I C	4		225 I C	447		48 P L R	67		227 I C	415
97FB47	P L R	358		47 Cr L J	730		47 Cr L J	909	426	223 I C	499
	ILR (1945) L	355	229 221 I C	629		316FB226 I C	44	429	48 P L R	183	
	224 I C	135		47 Cr L J	225		48 P L R	477		227 I C	401
103FB47	P L R	423	233FB48 P L R	280			ILR (1947) L	1	432	48 P L R	156
	ILR (1945) L	419		225 I C	456	322FB48	P L R	505		223 I C	474
	227 I C	216		ILR (1946) L	515		227 I C	2	440	48 P L R	172
	47 Cr L J	1022	247SB225 I C	414		329FB48	P L R	485		223 I C	637
112	225 I C	102		ILR (1947) L	22		226 I C	479	444	48 P L R	234
	47 Cr L J	687	256 48 P L R	21		330FB48	P L R	487		228 I C	44
116FB48	P L R	116		225 I C	329		226 I C	583	450	48 P L R	187
	227 I C	546	260 48 P L R	49		338FB226 I C	470			223 I C	505
	ILR (1946) L	692		225 I C	320		49 P L R	62	456	48 P L R	52
134FB48	P L R	147	263 224 I C	129		345FB226 I C	220			228 I C	233
	224 I C	468	265 222 I C	566			48 P L R	442		48 Cr L J	161
	ILR (1946) L	672	266 48 P L R	20		350	48 P L R	95	459	48 P L R	41
142FB47	P L R	28		225 I C	343		223 I C	143		223 I C	412
			267 222 I C	138		353FB 48 P L R	350	462	48 P L R	180	
							226 I C	606		228 I C	491

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ILR		A I R		ILR		A I R		PLR		A I R		PLR		A I R		PLR		A I R	
1	1946	PC	16	580	1946	L	353	49	1946	L	260	205	1946	L	419	410	1947	L	220
16	1945	L	313	667	"	PC	187	52	"	"	456	210	"	"	180	421	"	"	240
52	1944	"	455	672	"	L	134	56	"	"	41	234	"	"	444	425	"	"	188
63	1946	PC	51	692	"	"	116	64	"	"	424	243	1947	"	112	441	"	"	184
71	1945	L	274	751	1945	"	76	67	"	"	309	250	1946	"	280	442	1946	"	345
96	1946	FC	2	767	1946	"	1	77	"	"	406	275	1945	PC	91	450	"	PC	97
107	1947	L	168	788	"	"	394	86	"	"	380	280	1946	L	233	454	1947	L	199
119	1946	PC	82	805	1947	"	40	95	"	"	350	302	"	PC	66	471	"	"	102
147	1944	L	142					100	"	"	414	311	"	"	45	477	1946	"	316
173	1946	"	301					102	"	"	413	313	"	"	43	485	"	"	329
185	1945	"	69					104	"	"	305	315	1947	L	171	487	"	"	330
205	"	"	137					106	"	"	222	317	"	"	73	499	1947	"	227
239	"	"	238					116	"	"	116	321	"	"	243	505	1946	"	322
284	1946	"	54					138	"	"	416	323	"	"	72	515	"	"	199
291	1947	"	261					141	"	"	399	325	"	"	76	521	1947	"	233
295	"	"	47					147	"	"	134	337	1946	PC	38	526	"	"	236
300	"	"	117					156	"	"	432	342	1947	L	244	532	"	"	306
399	1945	"	201					168	1947	"	100	350	1946	"	353	538	"	"	269
427	"	"	298					172	1946	"	440	377	1947	"	177				
467	1946	"	142					176	"	"	298	382	"	"	92				
483	1945	"	286					180	"	"	462	393	"	"	210				
515	1946	"	233					183	"	"	429	400	"	"	40				
561	"	"	220					187	"	"	450	406	"	"	185				
569	"	PC	165					195	"	"	387								
																		</	

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47 Cr L J		47 Cr L J		47 Cr L J		47 Cr L J		47 Cr L J		47 Cr L J	
Cr L J	A I R	Cr L J	A I R	Cr L J	A I R	Cr L J	A I R	Cr L J	A I R	Cr L J	A I R
4	1945 L 105	220	1945 M 409	418	1945 N 207	599	1946 S 153	831	1946 PC 123		
22	1946 O 15	221	1946 S 75	421	" M 516	601	" A 161	834	" P 140		
23	1944 B 259	225	" L 229	425	1946 A 7	609	" O 234	835	" N 72		
27	1945 O 20	229	1945 Pesh 53	426	1945 FC 21	611	" A 191	838	" FC 25		
29	" P 334	230	" M 424	429	" N 203	614	" P 384	840	1947 N 45		
32	" L 47	231	" B 493	434	1946 P 117	616	" PC 82	843	1946 M 390		
33	1944 N 221	232	1946 L 48	435	" M 7	622	" P 20	844	1947 C 179		
37	1945 S 125	233	1945 M 440	436	" P 130	623	1947 C 29	846	" A 105		
40	" O 180	234	1946 L 41	437	" A 4	625	1946 N 301	850	1946 M 426		
43	" A 306	240	1945 N 127	440	" P 128	630	" S 67	851	" N 173		
44	" L 158	242	" M 446	441	" N 120	633	" N 261	865	" M 430		
50	" M 313	243	" L 65	445	" P 108	635	1947 C 120	866	" S 129		
51	" B 292	245	" N 284	446	" C 36	636	" N 60	869	" M 414		
61	" PC 147	247	" L 281	450	1947 C 342	638	1946 A 484	870	1947 C 183		
66	" O 48	248	" M 441	451	1946 A 253	639	" PC 79	872	1946 M 412		
69	" N 163	249	" A 385	452	1945 Pesh 46	642	" O 230	873	1947 N 109		
76	" O 170	251	" C 423	455	1946 S 1	645	" L 158	875	1946 M 465		
77	" Pesh 33	252	" B 484	463	1945 P 444	662	1947 C 162	876	" A 416		
78	" S 110	257	" C 402	465	1946 C 1	673	1946 S 160	884	" B 465		
81	" O 228	268	1946 P 75	469	" A 19	674	" N 362	887	1947 O 68		
82	" A 291	269	1945 L 286	483	" P 107	677	" A 249	890	1946 M 413		
84	" S 51	276	" Pesh 50	484	" B 36	680	1947 C 35	891	" N 432		
88	" M 317	277	" L 293	487	" S 17	681	1946 PC 115	892	" P 285		
89	" A 226	283	" S 81	489	" PC 16	685	1947 C 158	898	" M 415		
90	" M 345	294	" O 266	493	" A 53	686	1946 M 247	899	" C 286		
92	" N 153	297	" B 533	494	" B 24	687	" L 112	900	" B 492		
95	" C 363	302	" C 482	497	" P 1	691	1945 P 376	903	" A 393		
102	" O 296	304	1946 P 109	510	" C 330	695	1946 C 156	905	" PC 151		
104	" A 230	305	" C 303	511	" A 371	698	" M 254	909	" L 309		
106	" M 250	306	" O 108	512	" S 23	699	1947 C 31	916	" S 154		
109	" B 305	308	" P 34	513	" N 256	700	1946 B 276	918	" N 321		
111	" N 269	310	" O 124	514	" M 83	704	1947 A 13	927	" P 160		
113	" M 358	311	" A 15	516	1945 L 238	705	1946 C 449	930	1947 O 41		
115	" L 206	316	" C 270	528	1946 A 116	706	1947 A 12	932	1946 P 357		
119	" N 104	317	1947 P 251	529	" C 71	707	" P 138	933	" PC 169		
121	1946 O 13	319	1946 B 86	531	" O 227	708	1946 M 245	936	" M 447		
123	1945 B 368	320	" C 302	532	" A 153	710	1947 C 32	937	" P 373		
125	" C 340	321	" B 7	534	" M 112	714	1946 O 250	943	" C 305		
126	" M 355	325	" C 493	535	" A 138	718	1947 O 1	944	" M 480		
127	" S 113	328	" P 330	536	" C 139	721	1946 B 315	945	" P 158		
130	" L 149	333	" A 298	537	" M 96	725	1947 O 35	947	" N 372		
132	" A 207	335	" S 115	538	" N 305	730	1946 L 222	948	" M 449		
138	" B 413	336	" PC 38	539	" M 102	737	" C 537	949	1947 L 180		
142	" C 385	339	" P 191	540	" S 37	739	1947 N 36	951	" C 345		
143	" L 201	344	" PC 45	541	" A 146	741	" P 106	953	" A 70		
148	" N 216	345	" L 22	542	" C 440	742	" N 33	954	" C 339		
149	" M 284	348	" N 221	543	" O 228	744	1946 B 322	955	1946 A 457		
152	" A 280	351	" M 44	545	" A 156	747	" L 278	962	" B 446		
154	" P 388	352	" C 314	547	" P 76	749	1947 P 51	968	1947 N 113		
155	" L 215	356	" PC 43	548	" S 43	752	1946 B 325	971	1946 S 132		
157	" M 330	357	" M 60	553	" P 79	755	1947 C 343	976	1947 P 245		
158	" P 306	358	1947 L 37	555	" B 184	757	1947 A 333	980	1946 L 380		
159	" S 132	361	1946 B 18	556	" A 223	772	1947 L 92	986	1947 P 172		
173	" M 377	364	" N 225	560	" P 82	780	" P 107	991	1946 M 496		
174	1946 PC 12	367	" " 263	561	" L 54	784	" N 83	992	1947 P 264		
175	1945 N 210	368	" L 26	564	" C 483	785	1946 M 271	993	1946 M 502		
177	" P 295	372	" M 97	568	" P 30	794	1947 N 79	994	1947 N 1		
178	" M 302	373	" A 88	569	" PC 20	796	" O 9	1006	" S 41		
179	" P 316	374	" S 121	573	" P 74	799	1946 P 119	1013	1946 P 389		
181	" M 379	378	" B 38	574	" N 374	800	" FC 27	1016	" " 412		
183	" P 362	383	" N 200	575	1945 PC 181	804	" A 365	1017	1947 L 238		
189	" N 263	385	" P 435	578	1946 S 62	810	" L 275	1019	" O 86		
190	" P 375	387	" A 117	583	" FC 2	812	" P 162	1020	1946 C 459		
192	" M 289	388	" P 381	586	" M 157	814	1947 C 192	1022	" L 103		
193	" C 421	391	1947 L 106	587	" N 258	817	1946 P 101	1031	" N 350		
195	" M 331	397	1946 N 150	588	" O 233	818	" L 301	1034	" M 489		
196	" N 143	398	1947 O 65	589	" M 153	821	" P 104	1036	1945 L 334		
200	" A 397	400	1945 N 218	590	" B 189	822	" N 57	1038	1946 M 223		
202	" C 441	408	" S 75	592	" M 45	825	1947 A 351	1041	" A 227		
209	" A 389	415	" M 521	594	" B 183	826	1946 A 298	1047	" M 495		
212	1946 L 36	417	" C 466	595	" M 167	829	" L 35	1048	" B 65		
217	1945 N 226			596	" A 170		1947 N 35	1068	" M 484		

Other Journals = All India Reporter (contd.)

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222 I C			222 I C			222 I C			223 I C			223 I C		
I C	A I R		I C	A I R		I C	A I R		I C	A I R		I C	A I R	
1	1945 PC	108	280	1945 N	218	510	1946 B	24	89	1946 M	56	294	1946 P	429
3	1946 C	113	288	" S	75	513	" S	10	90	" N	273	296	" C	318
8	" L	62	295	" L	309	517	" B	60	93	" O	156	297	" P	298
11	" P	268	298	1946 N	164	520	" C	303	96	" C	314	300	" L	416
13	" "	64	299	1945 M	521	521	" PC	34	99	1947 L	37	302	" S	116
14	1945 B	336	301	" L	175	522	" C	270	103	1946 PC	13	303	1947 P	45
16	" O	250	304	1946 PC	3	524	1945 N	294	106	" M	60	305	1946 N	275
17	" L	180	306	" P	270	526	1946 O	106	107	" S	112	307	" S	117
19	" B	345	308	" O	101	528	" C	302	110	" B	18	311	" A	372
22	1946 L	268	310	1945 N	207	529	" PC	38	113	" N	232	318	" N	264
26	" S	70	314	" C	466	532	" O	108	116	" L	414	320	" C	498
28	1945 L	65	315	1946 P	263	534	" PC	50	117	" C	426	321	" B	109
30	" O	295	319	1945 C	458	536	" O	127	118	" M	44	322	" C	330
31	" N	127	328	" M	516	538	" A	15	119	" N	225	324	" P	440
33	" M	446	332	1946 A	7	542	" O	118	120	" L	22	325	" M	90
34	" O	312	333	" O	99	545	1947 A	10	123	" N	221	328	" C	127
36	" M	424	336	1945 N	296	547	1946 O	124	126	1947 P	1	330	1947 P	7
37	" A	400	337	1946 B	1	548	" C	233	130	1946 L	418	334	1946 M	65
38	" L	281	343	1945 N	203	549	" O	110	131	" P	441	336	" P	316
39	" C	306	347	" O	308	557	" M	52	134	" A	54	351	" C	88
41	" A	335	350	" N	277	561	1945 Pesh	34	136	" N	263	352	" M	31
46	" L	199	353	1946 P	165	562	1946 O	148	137	" L	26	353	" L	81
48	1946 C	140	355	" O	116	563	" PC	35	142	" A	56	354	" S	23
57	" P	77	357	" P	107	566	" L	265	143	" L	350	355	" A	127
59	" C	110	358	" M	7	567	" C	231	146	" A	61	361	" C	381
61	" P	75	359	" P	130	570	" P	34	152	" L	413	362	" PC	53
62	" L	47	360	" M	5	572	" A	267	153	" PC	20	365	" A	406
64	1945 A	146	362	" P	117	574	" O	149	157	" A	117	369	" B	149
65	" P	339	363	1945 L	313	579	" S	108	158	" C	319	373	" O	163
88	" S	152	373	1946 P	109	583	" A	331	161	" A	88	394	" PC	59
107	1946 L	306	375	" A	1	585	" C	288	162	" P	295	398	" L	82
110	1945 B	504	378	" P	185	596	" A	328	164	" PC	25	400	" N	150
117	" FC	21	381	" L	1	597	" C	427	173	" P	216	402	" S	32
120	1946 C	120	385	" P	108	604	" P	278	174	1947 C	27	406	" A	116
121	1945 O	303	386	1945 O	310	610	" S	115	175	1946 A	58	407	" M	78
123	" A	172	388	1946 P	128	616	" P	330	178	" M	50	408	" C	483
125	" N	284	389	" N	120	617	" A	303	179	" A	85	412	" L	459
128	" O	319	393	" A	4	618	" P	190	182	" A	59	414	" C	367
129	1946 L	263	396	" N	69	620	1945 Pesh	24	184	" M	51	417	" L	419
131	1945 B	542	399	" A	12	621	1947 P	251	190	" B	121	422	" C	129
133	" A	153	402	" C	6	623	1946 A	304	194	" S	125	427	1947 L	106
134	" L	213	406	" L	6	624	" P	284	195	" A	38	433	1946 A	410
136	" A	385	410	" M	32	626	" A	298	200	" B	51	437	" N	419
138	1946 L	267	411	" C	36	628	" O	146	201	" M	51	442	" P	459
139	" S	72	415	" A	282	630	" S	150	206	" P	347	448	" A	387
142	1945 M	441	416	" M	1	632	" O	144	223	" O	193	450	" M	104
143	" B	484	420	" A	253	643	1947 A	214	225	" P	435	451	" P	27
148	1946 A	269	421	" A	342	646	1946 S	25	227	" O	161	453	" M	58
155	1945 B	497	423	1947 C	276	647	" M	57	229	" N	200	454	" S	148
162	1946 L	272	424	1946 A	276	650	" A	300	232	" L	31	456	" M	73
165	1945 A	137	427	1945 Pesh	46	652	" L	20	233	" P	470	457	" P	466
166	" C	402	431	1946 C	239	655	" N	170	236	" S	20	458	" L	73
177	" L	298	439	" S	1		" B	86	238	" P	336	462	" C	414
189	1946 PC	1	446	" P	225				240	" O	242	463	1947 O	65
191	" N	169	448	" O	121		223 I C		241	" P	309	464	1946 M	110
192	1945 O	208	450	1945 P	444	IC	A I R		243	" PC	51	465	" B	155
194	1946 N	160	455	1946 B	12	1	1946 PC	46	247	" L	16	466	" C	460
195	" PC	24	457	" P	19	3	" M	49	248	" PC	57	467	" A	389
196	1945 A	121	459	" A	256	4	" A	294	250	1947 P	11	470	" C	444
210	1946 P	272	463	" C	1	9	" O	159	251	1946 O	210	474	" L	432
216	1945 O	184	465	" A	254	11	" PC	43	256	" P	365	481	" C	440
224	" L	286	466	" C	35	12	" O	104	257	" O	226	482	" A	384
231	1946 A	259	467	" M	10	15	" PC	6	260	" B	102	484	" O	61
234	1945 L	293	469	" N	188	20	" L	180	261	" M	63	486	" N	228
240	1946 A	262	475	" L	10	34	" PC	45	262	1947 C	67	489	" A	444
244	1945 O	305	477	" C	10	35	" B	7	263	1946 M	74	491	" N	165
248	" Pesh	50	493	" A	19	40	" O	88	275	" P	1	496	" C	135
249	" S	81	494	" M	11	44	" C	493	276	" A	371	499	" L	426
260	" O	266	495	" A	53	47	" PC	42	281	" O	211	502	" C	118
263	" M	480	497	" S	17	48	" O	125	282	" P	381	504	" M	97
265	" C	482	501	" B	36	50	" S	28	284	" S	30	511	" L	450
267	" B	533	503	" S	19	52	" N	196	289	" N	226	513	" C	71
271	" L	194	506	" C	236	56	1945 P	404	291	" L	57	515	" A	153
273	1946 PC	16		" B	20	67	1946 A	34		" O	154		" C	123
277	1945 Pesh	51		" A	8	85	" P	191		" S	14			

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223 I C				224 I C				224 I C				224 I C				225 I C				
I C		A I R		I C		A I R		I C		A I R		I C		A I R		I C		A I R		
519	1946	S	39	52	1946	A	159	288	1946	A	431	464	1946	Pesh	3	110	1946	C	159	
523	"	M	88	55	"	C	450	289	"	B	200	466	"	PC	63	114	1945	P	376	
525	"	O	72	57	"	A	414	290	1947	A	49	468	"	L	134	118	1946	N	137	
526	"	A	138	58	"	M	81	291	1946	B	167	476	"	B	216	120	"	P	150	
527	"	B	154	60	"	FC	2	292	"	M	153	520	1947	N	43	122	1947	A	38	
528	"	O	227	64	"	N	320	293	"	N	258	523	1946	M	147	125	1946	N	161	
530	"	M	83	65	"	P	404	294	"	B	169	525	1947	C	131	126	"	A	456	
531	"	A	146	67	"	A	200	296	"	M	169	526	1946	N	393	127	"	M	258	
533	1945	M	122	71	"	B	171	297	"	P	401	530	1947	O	66	130	"	C	217	
536	1946	PC	184	74	"	M	124	299	"	C	55	532	"	L	28	142	"	B	187	
537	"	M	89	76	"	A	223	306	"	B	201	534	1946	PC	79	145	1947	S	22	
539	"	C	63	80	"	C	53	308	"	M	47	536	"	S	156	147	1946	P	369	
542	"	O	83	81	"	B	185	310	"	C	44	537	"	O	213	149	"	O	238	
548	"	PC	66	83	"	S	43	311	"	O	233	543	"	M	38	152	1947	P	129	
550	"	M	103	88	"	P	79	312	"	P	419	547	"	B	113	153	1946	C	156	
553	"	PC	75	90	"	M	105	316	"	S	158	548	"	A	189	156	"	P	207	
565	"	P	447	94	"	FC	16	319	"	P	437	550	1945	Pesh	37	159	"	A	508	
566	"	S	37	103	"	P	74	322	"	L	85	551	1946	O	230	161	1947	"	36	
567	"	M	98	104	"	M	113	330	"	M	93	554	"	PC	100	162	1946	M	79	
569	"	PC	72	108	"	A	198	331	"	P	385	558	"	N	315	163	"	N	147	
570	"	M	96	110	"	M	94	335	"	C	45	560	"	C	477	164	"	M	248	
571	1947	N	156	111	"	C	375	337	"	M	163	562	"	N	428	166	1947	L	24	
575	1946	P	70	117	"	L	387	338	1947	N	31	566	"	M	37	167	1946	M	254	
576	"	M	102	124	"	M	86	340	1946	M	150	567	"	N	347	169	"	L	220	
577	"	C	121	125	"	A	178	341	"	B	188	570	"	C	438	171	1947	O	6	
578	"	M	121	131	"	P	30	342	"	M	167	572	1947	L	25	172	1946	A	289	
579	"	N	256	132	"	M	118	343	"	B	168	575	1946	C	441	174	1946	L	73	
586	"	L	65	135	"	L	97	344	"	M	45	578	"	N	375	177	1947	P	132	
587	"	M	112	141	"	M	154	346	"	A	170	580	1947	C	158	179	"	A	3	
591	"	A	133	142	"	B	204	350	"	M	130	581	1945	Pesh	35	180	1946	PC	109	
593	"	M	95	145	"	A	195	352	"	N	353	583	1946	N	357	185	"	A	174	
594	"	A	148	148	"	B	203	353	"	M	136	586	1947	C	259	188	1946	PC	103	
595	"	FC	1	149	"	A	496	354	"	C	15	589	1946	N	397	193	"	A	26	
596	"	M	87	150	"	B	163	356	"	A	161	593	"	O	241	195	1947	C	26	
598	"	O	254	154	"	O	236	364	"	C	81	594	"	B	138	200	1946	M	209	
599	"	M	111	155	"	N	374	366	"	A	191	598	"	PC	97	219	"	A	89	
605	"	A	438	156	1945	PC	181	370	1947	L	80	601	"	A	249	221	"	O	247	
608	"	M	108	160	1946	P	417	372	1946	S	153	604	"	S	160	222	1947	C	31	
609	"	"	101	161	"	A	204	373	"	C	40	605	"	C	194	224	"	O	7	
611	"	P	415	169	"	B	193	377	1947	L	29	608	"	L	158	226	"	P	40	
615	"	S	58	175	"	C	12	381	"	C	364	625	1947	C	162	229	1946	A	284	
617	"	P	313	177	1947	P	356	384	1946	O	234	636	1946	M	207	232	"	B	276	
618	"	PC	48	184	1945	L	238	386	"	A	493	638	"	N	362	235	"	A	277	
621	"	B	157	196	1946	A	150	388	"	B	57		225 I C				236	1947	S	4
623	"	C	139	199	"	L	54	391	"	A	476		I C	A I R		239	"	C	127	
626	"	L	78	201	"	A	447	397	"	M	140	1	1946	PC	92	242	"	A	13	
629	"	FC	13	203	"	A	473	402	"	C	473	6	"	A	287	244	"	P	377	
631	"	N	305	204	"	M	146	398	"	P	384	8	1947	L	54	247	"	C	124	
634	"	B	159	206	"	A	473	402	"	N	260	21	1946	O	244	250	"	P	141	
637	"	S	55	208	"	B	192	404	"	A	497	24	"	O	339	252	1946	N	249	
	"	L	440	209	"	M	145	406	"	P	403	32	"	O	256	254	1947	C	28	
				210	"	A	435	411	"	M	133	73	"	N	359	297	1947	L	83	
				219	1945	PC	188	417	1947	O	28	84	"	S	98	800	"	C	32	
				224	1946	N	311	418	1946	P	153	86	"	A	25	304	1946	B	272	
				225	"	S	62	420	1947	C	327	88	"	M	75	307	"	C	259	
				230	"	O	223	422	1946	P	20	90	"	A	509	308	"	O	250	
				232	"	B	88	424	1947	C	29	91	"	PC	135	311	"	B	266	
				246	"	M	61	426	1946	P	138	94	"	A	512	317	"	A	291	
				248	"	C	51	432	1947	PC	82	96	"	PC	115	320	"	L	260	
				250	"	A	184	434	1946	C	330	98	"	M	247	323	"	M	281	
				255	"	A	168	435	1947	P	39	101	"	L	112	325	"	N	163	
				256	"	M	168	436	1946	M	133	102	"	M	251	328	"	A	280	
				260	"	B	189	440	"	N	301	106	"	PC	78	329	"	L	256	
				261	"	M	164	445	"	S	67									
				263	"	C	65	447	"	N	313									
				266	"	M	19	439	"	M	35									

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I C	A I R		I C	A I R		I C	A I R		I C	A I R		I C	A I R	
332	1946	M 264	560	1947	N 83	147	1946	S 128	399	1946	P 371	17	1947	S 48
335	"	M 283	561	"	C 190	148	"	PC 151	400	"	M 391	19	"	N 116
337	1947	C 139	562	"	P 119	153	"	M 381	404	"	P 373	24	"	O 81
339	"	L 72	565	1946	B 322	154	1947	O 45	411	"	M 461	27	1946	B 401
340	1946	N 344	567	"	L 278	175	1946	M 372	414	"	PC 169	33	1947	S 31
343	"	L 266	569	1947	P 51	178	1947	N 45	417	"	M 447	34	"	N 81
344	"	M 262	572	1946	B 325	181	1946	FC 25	418	1947	A 68	36	"	P 273
346	1947	C 367	575	1947	C 137	182	"	M 390	420	1946	PC 173	38	"	C 236
348	1946	M 296	577	1946	B 407	183	1947	C 179	423	"	M 449	44	"	A 86
349	1947	L 49	593	"	M 271	186	1946	P 120	424	1947	A 187	47	1946	B 396
354	"	C 96	602	"	L 142	188	1947	C 41	425	"	L 172	50	"	A 468
355	1946	N 135	606	"	C 524	195	1946	P 301	426	"	C 68	55	"	M 503
357	"	B 328	609	"	A 333	199	"	B 454	429	1946	S 161	57	1947	A 83
362	"	L 193	623	"	C 336	204	1947	A 105	434	1947	L 175	58	"	N 84
367	1947	C 154	624	1947	N 79	208	1946	M 396	436	1946	N 371	61	"	S 74
369	1946	L 216	626	"	O 9	210	"	B 346	437	1947	L 180	67	1946	B 482
372	"	B 304	629	1946	P 97	213	"	S 126	439	"	O 44	76	"	A 425
377	"	M 298	630	1947	C 182	215	"	M 426	440	"	A 199	83	1947	PC 8
379	"	N 148	632	1946	P 105	216	"	A 379	442	1946	N 372	88	1946	M 508
380	1947	P 121	634	"	A 357	219	"	M 413	444	1947	L 215	89	1947	C 255
382	"	O 87	637	"	P 50	220	"	L 345	449	"	O 4	93	1946	M 482
383	"	P 112	638	1947	L 182	225	"	B 350	450	"	C 195	94	1947	O 43
384	1946	C 90	640	1946	P 119	228	"	M 408	456	"	A 70	95	"	L 210
402	"	B 309				229	"	P 110	457	"	N 93	100	"	O 101
408	1947	P 65		226 I C		235	1947	O 17	460	"	O 79	103	1946	M 485
410	1946	N 317	IC	A I R		241	"	L 177	462	1946	M 460	106	1947	C 275
413	1947	P 138	1	1946	PC 127	245	1946	N 173	463	"	P 372	110	1946	M 472
414	1946	L 247	5	"	L 280	258	"	P 297	464	"	M 453	117	"	C 416
423	1947	O 1	21	"	P 174	259	"	M 427	467	"	B 462	127	1947	N 73
426	1946	C 537	22	"	A 365	262	"	S 129	469	1947	C 339	129	1946	S 141
427	"	M 257	28	"	P 118	265	"	M 414	470	1946	L 338	135	"	B 499
428	1947	O 13	29	"	L 275	266	"	B 459	476	1947	C 345	146	1947	N 75
430	1946	B 315	31	"	P 162	269	"	M 430	478	1946	M 452	147	"	A 171
434	"	M 291	33	1947	C 192	271	"	C 183	479	"	L 329	148	1946	M 481
436	1947	N 14	36	1946	P 101	273	1947	M 423	481	"	A 457	149	1947	S 41
439	"	O 35	37	"	M 289	276	1946	N 109	488	"	C 530	156	1946	M 483
444	1946	B 337	39	"	P 81	278	1947	A 416	495	"	B 446	157	"	P 389
447	"	L 222	40	"	PC 132	286	1946	N 432	500	1947	N 113	160	"	PC 189
454	"	M 232	43	"	P 104	287	"	B 465	503	1946	B 469	167	"	P 412
456	"	L 233	44	"	L 316	290	1947	N 76	511	"	S 132	168	1947	C 93
469	"	M 285	50	"	PC 123	292	"	L 173	516	1947	P 245	172	1946	P 408
471	"	A 329	53	1947	C 185	294	"	N 78	521	1946	L 380	176	"	N 343
472	"	S 103	58	1946	A 362	295	"	PC 165	527	"	P 338	177	1947	PC 19
477	"	PC 119	60	1945	P 326	298	1946	N 69	535	"	M 464	185	"	L 238
481	"	M 227	68	1946	N 251	303	1947	C 337	536	1947	P 172	186	"	O 77
482	"	A 283	70	"	L 301	305	1946	O 68	540	"	C 245	189	"	C 249
483	"	M 261	73	"	B 319	307	1947	N 106	543	"	O 84	194	"	" 266
484	1947	N 36	76	"	M 287	310	"	L 394	545	"	A 89	195	"	PC 15
487	1946	M 236	78	1947	N 57	316	1946	P 285	547	1946	M 466	198	1946	M 494
493	"	B 340	81	1946	M 375	322	"	M 415	551	1947	A 90	199	"	PC 178
496	"	M 294	83	"	A 351	323	"	C 286	552	"	P 250	201	1947	A 88
497	1947	O 3	84	"	L 298	324	"	B 492	553	1946	A 448	202	"	C 244
498	1946	M 299	87	1947	N 35	327	"	A 393	560	"	M 456	203	"	A 85
499	1947	N 53	88	1945	P 391	329	"	B 481	561	1947	O 71	204	"	O 86
502	"	P 118	95	1946	B 437	330	"	C 508	565	1946	PC 137	206	"	S 32
503	1946	M 266	97	"	P 154	339	"	M 387	568	1947	N 145	208	"	O 74
507	"	A 385	101	1947	N 56	340	"	S 137	576	"	P 264	212	1946	C 459
508	"	C 168	102	1946	B 353	343	"	C 500	578	1946	M 496	213	"	P 414
515	1947	P 106	104	"	N 72	350	"	P 306	579	"	B 477	214	1947	A 174
516	1946	C 266	107	"	C 338	353	"	S 154	582	"	M 502	216	1946	L 103
520	"	FC 27	108	"	A 349	355	"	P 361	583	"	L 330	225	"	P 407
524	"	C 260	111	"	M 331	358	"	A 52	590	1947	N 1	226	"	B 399
525	1947	N 83	112	"	P 36	363	1947	P 354	603	"	A 58	228	1947	C 241
528	"	P 139	115	"	C 331	366	1946	L 230	604	"	C 248	232	1946	M 491
530	"	C 157	119	"	P 140	369	1947	C 73	606	1946	L 353	233	"	N 350
532	"	P 122	120	"	L 277	371	"	O 33	631	1947	S 49	236	1947	C 270
534	"	C 343	122	"	P 199	374	"	P 358	639	"	L 184	239	1946	M 489
536	"	O 15	123	"	M 377	377	1946	N 321				241	1947	L 240
538	"	C 70	125	"	P 188	386	"	M 470				244	"	P 178
541	1946	P 62	127	"	A 355	388	"	P 357				247	1946	M 492
544	1947	L 92	129	"	P 55	389	"	O 41				248	1947	P 197
552	"	P 107	133	"	M 300	391	1947	P 353				250	"	N 91
555	1946	B 342	137	"	P 103	393	1946	C 283				253	1946	P 310
559	"	P 184	138	"	B 423	398	1947	M 458				255	1945	L 334
			144	"	P 15							258	1946	M 500

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I C	A I R		I C	A I R		I C	A I R		I C	A I R		I C	A I R	
260	1947	O 94	365	1946	S 93	445	1947	O 88	515	1946	B 356	578	1946	A 465
261	1946	M 223	369	"	M 450	446	1946	P 176	519	"	PC 145	580	"	B 377
262	1947	A 177	370	"	S 89	447	"	B 363	525	"	M 388	598	1947	P 271
266	1946	M 497	374	"	M 457	449	"	C 465	527	"	C 261	600	1946	C 370
269	"	A 227	375	"	L 199	456	"	M 444	532	"	A 382	605	1945	P 398
276	"	B 365	376	1947	P 263	458	"	C 317	533	"	C 488	607	1946	N 216
287	"	S 99	377	1945	L 274	459	"	B 510	538	"	M 366	612	"	P 200
290	"	M 495	384	1946	M 451	465	"	M 448	541	"	A 400	613	"	M 411
291	"	C 461	385	1945	P 322	466	"	N 210	543	"	C 304	615	"	P 102
294	"	M 484	390	1947	O 116	472	"	M 446	544	"	M 431	616	"	M 416
295	"	PC 156	396	"	P 266	473	"	A 486	546	"	L 116	619	"	P 47
303	"	B 65	401	1946	L 429	475	1945	L 324	564	"	M 380	622	"	B 126
323	"	C 382	404	"	P 40	485	1946	C 496	565	"	A 466	625	"	P 127
336	"	B 495	411	"	B 361	488	"	L 406	566	"	L 305	626	1947	A 181
340	"	L 399	413	"	P 292	494	"	C 323	568	"	M 409	630	1946	P 214
345	1947	N 129	415	"	L 424	496	"	M 434	570	1947	P 257	631	"	" 122
357	1946	M 443	417	"	P 51	499	"	N 235	574	1946	A 392	633	1947	S 94
358	"	A 488	421	"	A 306	504	"	P 143	575	1947	P 261	638	1946	P 167
360	"	M 437	443	"	P 125	511	"	M 419	577	"	O 91	639	"	" 142

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Lah. 175 : 124 I. C. 686

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Chandulal Parmanand v. Grahams Trading Co.
(India) Ltd., ('41) 43 P.L.R. 693=I.L.R. (1942)
Lah. 788=28 A. I. R. 1941 Lah. 427=198
I. C. 17

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=23 A. I. R. 1936 Lah. 717=165 I. C. 601

Held overruled by A. I. R. (28) 1941 Lah. 384
(F.B.) in A.I.R. (33) 1946 Lah. 338 (F.B.).

Fatima, Mt. v. Nura, ('38) 25 A. I. R. 1938 Lah.
294 : 39 P. L. R. 1010 : 175 I. C. 56

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Ghansham Das v. Anant Singh, ('27) 9 L. L. J.
276=14 A. I. R. 1927 Lah. 757=102 I. C.
893

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Lah. 31.

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608 : 7 L. L. J. 288 : 12 A. I. R. 1925 Lah.
493 : 90 I. C. 620

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A. I. R. 1925 Lah. 497 : 7 L. L. J. 290 : 90
I. C. 632

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('29) 11 L. L. J. 282=16 A. I. R. 1929 Lah.
605=119 I. C. 481

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212=5 L. L. J. 347 = 10 A. I. R. 1923 Lah.
353=76 I. C. 592

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88 P. W. R. 1916 = 3 A. I. R. 1916 Lah.
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Decided on 24th March 1931, by Addison J.

Overruled in A.I.R. (33) 1946 Lah. 94 (F.B.).

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=10 A. I. R. 1923 Lah. 425=75 I. C. 590

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19th February 1943

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705=23 A.I.R. 1936 Lah. 192=163 I. C. 85

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Overruled in A. I. R. (33) 1946 Lah. 57 (F.B.).

Radha Kishan v. Bombay Co. Ltd. ('43) 45 P.L.R.
287=30 A.I.R. 1943 Lah. 295=212 I. C. 411

Overruled in A.I.R. (33) 1946 Lah. 116 (F.B.).

Sundar v. Mt. Tabo, ('41) 42 P. L. R. 819=28
A.I.R. 1941 Lah. 43=194 I. C. 310

Overruled in A.I.R. (33) 1946 Lah. 180 (F.B.).

Tarif Singh v. Kanshi Ram, ('36) 23 A. I. R. 1936
Lah. 458: 160 I. C. 642

Overruled in A. I. R. (33) 1946 Lah. 280 (F.B.).

Thakur Das v. Daulat Ram, ('26) 26 P. L. R. 825:
13 A. I. R. 1926 Lah. 189 : 91 I. C. 32

Overruled in A. I. R (33) 1946 Lah. 280 (F.B.).

Viranwali, Mt. v. Kundan Lal, ('28) 9 Lah. 106=
15 A.I.R. 1928 Lah. 267=112 I C. 35

Overruled in A.I.R. (33) 1946 Lah. 1 (F.B.).

THE ALL INDIA REPORTER

1946

Lahore High Court

[Case No. 1.]

* **A. I. R. (33) 1946 Lahore 1**
FULL BENCH

**ABDUL RASHID, MAHAJAN AND
KHOSLA JJ.**

*Mela Ram and others— Plaintiffs —
Appellants*

v.

*Mt. Bhagi and others— Defendants —
Respondents.*

First Appeal No. 220 of 1943, Decided on 19th June 1945, from reference made by Beckett and Bhandari, JJ., D/- 13th March 1945.

* **Hindu law — Reversioner — Next reversioner minor — Distant reversioner can sue :** 9 Lah. 106 : ('28) 15 A.I.R. 1928 Lah. 267 : 112 I.C. 35 and 1916 P. R. 60 : ('16) 3 A. I. R. 1916 Lah. 179 : 33 I.C. 763, **OVERRULED**.

The list given in *Rani Anand Kunwar's* case (6 Cal. 764 (P.C.)) of the exceptional circumstances in which the more remote reversioners might bring a suit to challenge an alienation by the widow is merely illustrative and is not meant to be exhaustive. [P 5 C 1, 2]

If a more remote reversioner sues for a declaration that a transfer of property will not affect his reversionary right, the presence of a nearer reversioner does not bar the suit, if the nearer reversioner is a minor : 9 Lah. 106 : ('28) 15 A. I. R. 1928 Lah. 267 : 112 I. C. 35 and 1916 P. R. 60 : ('16) 3 A.I.R. 1916 Lah. 179: 33 I.C. 763, **OVERRULED** ; Case law discussed. [P 5 C 2]

*Balmokand and Ram Krishan Juneja —
for Appellants.*

Cheranjiva Lal Aggarwal — for Respondents.

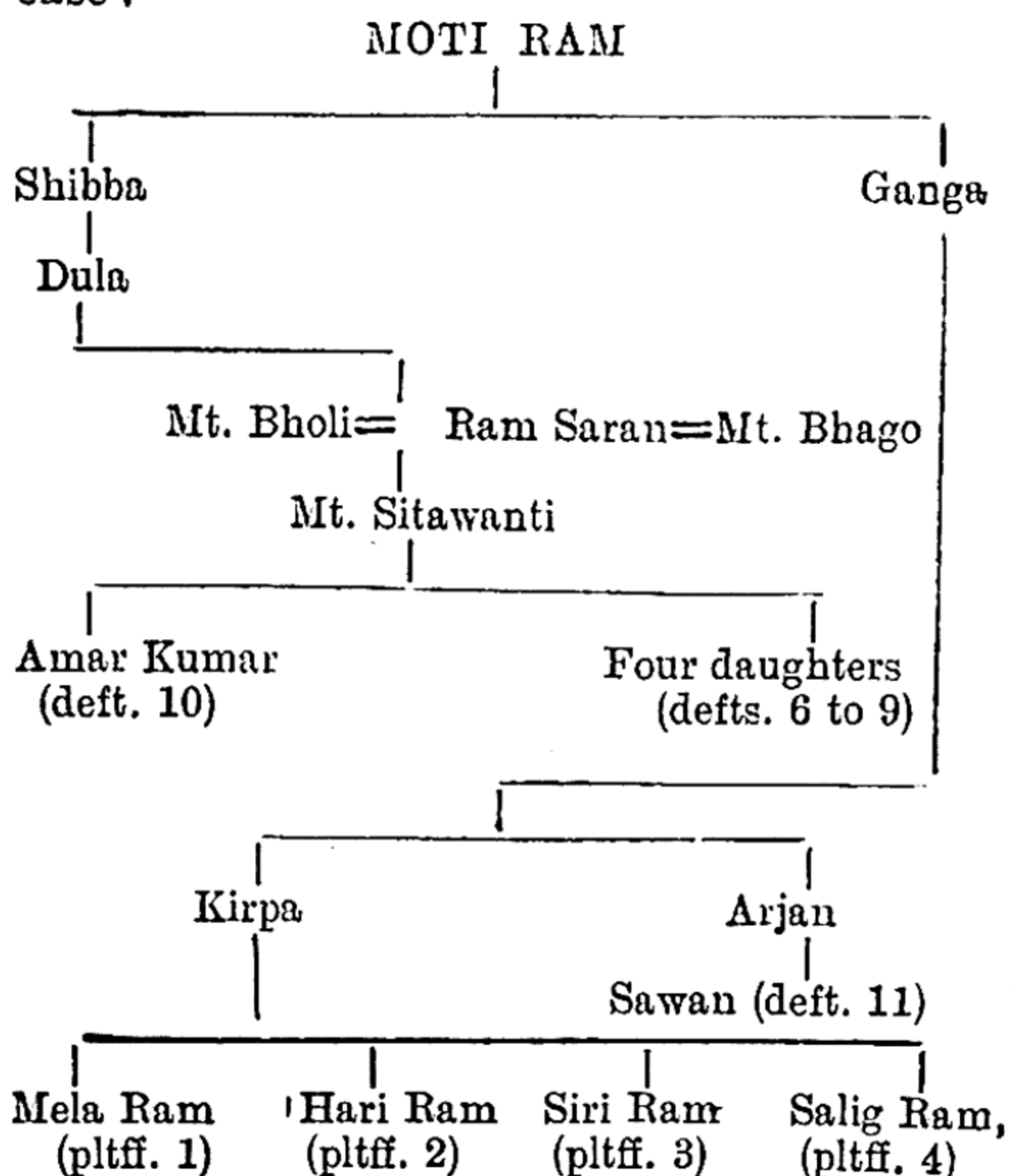
O P I N I O N

Abdul Rashid J.— The following question has been referred to this Full Bench for decision :

"If a more remote reversioner sues for a declaration that a transfer of property will not affect his reversionary rights, does the presence of a nearer reversioner bar the suit, if the nearer reversioner is a minor ?"

The following pedigree table will be
1946 L/1 & 2

helpful in understanding the facts of this case :



The property in dispute in this litigation belonged to Ram Saran, a Khatri of the Kangra district. He had two wives, namely, Mt. Bholi and Mt. Bhago. Mt. Bholi died in the lifetime of her husband leaving her surviving one daughter named Mt. Sitawanti. Mt. Bhago was alive at the time of her husband's death. Some disputes arose between Mt. Bhago on one side and Mt. Sitawanti on the other. They compromised these disputes and divided the estate left by Ram Saran between themselves in equal shares each treating the other as full owner. In 1940 Mt. Bhago sold the land in suit, which originally belonged to her husband, to the three sons of her sister Mt. Jamna Devi for a sum of Rs. 3448. In 1941 the present suit was instituted by the plaintiffs appellants for a declaration to the effect that the

alienation made by Mt. Bhago, being without consideration and necessity, shall not affect their reversionary rights after the death of the alienor. It was alleged in the plaint that Mt. Sitawanti had colluded with the vendees. No reference, however, was made to the children of Mt. Sitawanti. When the plaint was amended, Mt. Sitawanti and her children were made defendants. It was, however, stated that the children of Mt. Sitawanti were debarred from suing owing to collusion between their mother and the vendees. Mt. Bhago and the vendees pleaded that the parties were governed by Hindu law, that Mt. Bhago was the full owner of the property and the plaintiffs had no locus standi to sue in the presence of nearer reversioners, i. e., Mt. Sitawanti and her children. Mt. Sitawanti and her five children, who were made defendants, filed a written statement in the trial Court supporting the plaintiffs' claim in its entirety and stating that the alienation made by Mt. Bhago shall not be allowed to prejudicially affect their reversionary rights.

The trial Court held that the parties were governed by Hindu law, that the plaintiffs were collaterals of Ram Saran in the fourth degree, that Mt. Bhago had only a widow's estate and that there was no necessity for the sale which was the result of collusion. It was further held that Mt. Sitawanti was precluded by her conduct from bringing the suit. The suit of the plaintiffs was, however, dismissed on the ground that they had no right to maintain the present suit in the presence of the children of Mt. Sitawanti. Against this decision the plaintiffs have preferred an appeal to this Court. The vendees are the contesting respondents but the children of Mt. Sitawanti have also been made respondents in the appeal.

The learned counsel for the defendants-respondents relied strongly on the decision of their Lordships of the Privy Council in 6 Cal. 764.¹ It was maintained by the learned counsel that before a remote reversioner can institute a suit to challenge an alienation by a widow under Hindu law he must establish that the nearer reversioners are in collusion with the widow or the vendees or have otherwise precluded themselves from suing. The learned counsel laid particular stress on the following observation of their Lordships:

"It cannot be the law that any one who may

have a possibility of succeeding on the death of the widow can maintain a suit of the present nature, for, if so, the right to sue would belong to every one in the line of succession, however remote. The right to sue must in their Lordships' opinion, be limited. If the nearest reversionary heir refuses, without sufficient cause, to institute proceedings, or if he has precluded himself by his own act or conduct from suing, or has colluded with the widow, or concurred in the act alleged to be wrongful, the next presumable reversioner would be entitled to sue. In such a case, upon a plaint stating the circumstances under which the more distant reversionary heir claims to sue, the Court must exercise a judicial discretion in determining whether the remote reversioner is entitled to sue, and would probably require the nearer reversioner to be made a party to the suit."

It was urged by the learned counsel that the observations of their Lordships of the Privy Council were of general application and unless it be established in a particular case that the nearer reversioners were in collusion with the widow or had precluded themselves from interfering, a more distant reversioner can under no circumstances be allowed to maintain a declaratory suit to challenge the alienation. In my opinion, the true meaning and import of the observations of their Lordships of the Privy Council cannot be fully grasped without reference to the facts of the case in which these observations were made. The case before their Lordships was instituted by a minor plaintiff to contest an alienation made by a Hindu widow. It is clear from the genealogical table set out in the judgment that the minor in that case was the adopted son of Raja Kashipershad, who was the husband of Mt. Ummed Keor, a daughter of Mohan Lall, who was a brother of Koondun Lall, the father of Shunkersahai. Their Lordships observed that it was unnecessary to determine whether he could, under any circumstances, succeed by inheritance to the property of Shunkersahai. Admitting, however, for the sake of argument, that as an adopted son the minor had the same rights as a naturally born son, it could only have been in the character of a distant bandhu that he could have succeeded. The minor in that case had, therefore, not vested but at most a contingent interest in the property of Shunkersahai during the lifetime of his widow. In that case the Superintendent of the Court of Wards claimed in the plaint a right to sue on behalf of the minor as a reversionary heir without alleging that there were no other nearer reversioners in the line of succession or that those who were nearer had precluded themselves from suing. Their Lordships pointed out that there were

1. (81) 6 Cal. 764 : 8 I. A. 14 : 4 Sar. 195 (P.C.), Rani Anand Kunwar v. Court of Wards.

at least five reversioners who were majors and were alive and those reversioners would succeed in preference to the minor plaintiff. Moreover, Sitaram, the brother of Shunkersahai's father had three daughters all of whom had sons and those sons were also alive. In these circumstances the plaintiff's chance to succeed to the property of Shunkersahai was so remote as to be practically non-existent. In my opinion, the observations of their Lordships of the Privy Council that a suit may be brought by a more distant reversioner when those nearer in succession are in collusion with the widow or have precluded themselves from suing must be limited to the circumstances given in detail in the judgment of their Lordships. The list of the exceptional circumstances given in the judgment of the Privy Council in which a more remote reversioner might be allowed to bring a declaratory suit to challenge an alienation was merely illustrative and not exhaustive. To take one simple example, lunacy or insolvency of the nearer reversioners would entitle a more remote reversioner to maintain a declaratory suit to challenge the alienation by a widow but lunacy and insolvency have not been referred in the list of the exceptional circumstances given in the judgment of their Lordships in 6 Cal. 764.¹ The case in 6 Cal. 764¹ cannot, therefore, be regarded as one which lays down in specific terms that the minority of a nearer reversioner would not entitle a more remote reversioner to bring a suit for a declaration that the transfer of property by a widow will not affect his reversionary rights. The following observations in 8 Pat. 153² at p. 161 may be quoted in extenso:

"It is now firmly established that the Court in its discretion will not make a declaration in favour of a remote reversioner in regard to the acts and transactions of the widow unless the nearest reversioners refuse without sufficient cause to institute proceedings or unless they have precluded themselves by their own acts or conduct from suing or have colluded with the widow or concurred in the acts alleged to be wrongful: (see 6 Cal. 764.¹) But the rule stated in 6 Cal. 764¹ embodies a rule of prudence not a rule of law. In other words, it affects the question of discretion and not that of jurisdiction; for S. 42, Specific Relief Act, makes no distinction between the rights of a near and those of a remote reversioner."

It appears to me that a suit for a declaration that an alienation made by the widow would not be binding on the reversioners of her husband is a suit in a representative capacity on behalf of the entire reversionary

body. The right of the reversionary body is an indivisible right as at the time of the institution of the suit it is not known which of the reversionary heirs would be alive at the time when succession opens out and a suit for possession becomes competent. It is true that each reversioner can only sue for possession of his own share when the succession opens out but until the death of the widow the alienation can only be regarded as an act which is to the common detriment of the entire body of reversioners and the declaratory decree that is sought to be obtained is a decree which would enure for the benefit of the entire reversionary body. In 38 Mad. 406³ their Lordships observed that:

"A suit to set aside an adoption is brought by the presumptive reversioner in a representative capacity and on behalf of all the reversioners. The act complained of is to their common detriment, just as the relief sought for is for their common benefit. Under the above rule the contingent reversioner may be joined as plaintiff in the presumptive reversioner's suit, and, if so, it follows that on his death the 'next presumable reversioner' is entitled to continue the suit begun by him. The right to relief on the part of the reversioners exists severally in order of succession, and arises out of one and the same transaction impugned as invalid and not binding against them as a body and the dispute involves a common question of law, viz., the validity or invalidity of the act challenged as incompetently done."

In I.L.R. 1937 Mad. 948⁴ it was contended on behalf of the respondents that, though suits by remote reversioners when nearer reversioners are in existence have been dismissed, it does not necessarily follow that they should in all cases be dismissed, that the Court had a discretion in such cases and that the plaintiffs may be allowed to go on with the suit, provided such a course is not prejudicial to the interests of the nearer reversioners. This contention was given effect to by the Full Bench with the following observations:

"An examination of the above decisions reveals that though the law does not generally encourage declaratory suits by remote reversioners when nearer reversioners are in existence, still it is not always necessary that such suits should be dismissed, for Courts in a proper case may well allow the suit to go on, taking care to safeguard the interests of the nearer reversioners in existence."

In this connexion attention may be drawn to the following passage in 6 Cal. 764¹:

"In such a case. the Court must exercise a judicial discretion in determining whether

2. ('29) 16 A.I.R. 1929 Pat. 164 : 8 Pat. 153 : 119 I. C. 817, Balmokund Lal v. Mt. Sohano Kueri.

3. ('15) 2 A. I. R. 1915 P. C. 124 : 38 Mad. 406 : 42 I. A. 125 : 29 I. C. 298 (P.C.), Venkatanarayana Pillai v. Subbammal.

4. ('37) 24 A. I. R. 1937 Mad. 699 : I.L.R. (1937) Mad. 948 : 171 I. C. 7 (F.B.), Lakshmi Ammal v. Anantharama Ayyangar.

the remote reversioner is entitled to sue, and would probably require the nearest reversioner to be made a party to the suit."

In that case the plaintiffs were given permission to proceed with the suit making the nearer minor reversioner a defendant in the suit. The rule of law that the nearest reversioner must institute a suit in order to safeguard the interests of the entire reversionary body is based on the principle of expediency and to prevent multiplicity of suits. The cause of action of all the reversioners is the same and arises on the date of the alienation. In the present case, the children of Mt. Sitawanti, who are the nearest reversioners, have been made defendants in the case. They will be bound by any decree that may be passed in the suit brought by the more remote reversioners. In these circumstances no question of multiplicity of suits can arise. Moreover, the present suit is not liable to dismissal on the principle of expediency as any decision given in the present litigation would be binding on all the reversioners of Ram Saran as they are all on the record either as plaintiffs or as defendants. In my opinion, the law has been correctly summarised in S. 352 of Gour's Hindu Code (1938 Edition) in the following terms :

"(1) A suit to obtain any of the foregoing reliefs must be brought in the first instance by the presumptive reversioner but if owing to his minority, poverty, collusion, consent, ratification, waiver of his right as reversioner, estoppel or limitation, he is unable or unwilling, without sufficient cause to sue, then it may be brought by the reversioner next to him in succession but in that case the Court may join the presumptive reversioner as a party to the suit.

(2) A suit instituted by the presumptive reversioner may, on his death, or otherwise on proof of laches or collusion with the heiress whose acts are impugned, be continued by the next presumable reversioner.

(3) Where the immediate reversioner is a female, the nearest male reversioner may maintain such suit without having to show any of the causes mentioned in clause (1).

(4) Any adjudication made in such suit is res judicata as against the heir when the reversion opens."

It was contended by the learned counsel for the respondents that a contrary view had been adopted by a Division Bench of this Court in 9 Lah. 106.⁵ In that ruling it was observed that in the presence of daughters and a daughter's son (even if a minor) a remote Hindu reversioner is not entitled to sue in respect of an alienation by the widow in the absence of special circumstances. It was further observed that

the plaintiff should have stated in his plaint the circumstances under which he claimed to sue in the presence of the nearest reversionary heir and upon a plaint so framed the Court should have exercised its judicial discretion in determining whether the more remote reversioner was entitled to sue or not. In my opinion, the observations reproduced above were not necessary for the decision of the case. It was pointed out that the plaintiff could not convert his suit from one by a coparcener in a joint Hindu family to one by a reversioner to set aside an alienation by a widow in the presence of her daughters and a daughter's son. None of the facts necessary to be alleged in such a plaint were alleged, nor could the point be decided whether the suit should be allowed to proceed. The suit was based on the allegation that the plaintiff was joint with the husband of the widow and the widow was entitled to maintenance only. It was not a suit by a reversioner of a widow's husband to set aside an alienation made by her in detriment of his reversionary rights.

Reliance was also placed by the learned counsel for the respondents on the case in 60 P. R. 1916.⁶ This is a Single Bench judgment, and, with all respect to the learned Judge, I am of the opinion that the observations of their Lordships of the Privy Council in 6 Cal. 764¹ were given a very extended meaning. It was not realised that the list of exceptional circumstances in which the more remote reversioners might bring a declaratory suit was not intended to be exhaustive but only illustrative by their Lordships. This judgment was, therefore, based on a misapprehension of the true nature of the observations of their Lordships of the Privy Council in 6 Cal. 764.¹ In 40 ALL. 518⁷ again the true nature of the observations of their Lordships of the Privy Council in 6 Cal. 764¹ was misunderstood and it was laid down that in order that a reversioner may be able to maintain a suit to contest an alienation made by a Hindu widow, of her husband's property he must either be the next presumptive reversioner or he must show that the nearer reversioners were colluding with the widow. No attention was paid to those passages in the judgment of their Lordships of the Privy Council where they pointed out that the suit of the plaintiff was merely speculative and that he had

6. ('16) 3 A.I.R. 1916 Lah. 179 : 60 P. R. 1916 : 33 I. C. 763, Kanshi Ram v. Sarda Nand.

7. ('18) 5 A. I. R. 1918 All. 393 : 40 All. 518 : 46 I. C. 186, Gumanan v. Jahangira.

5. ('28) 15 A. I. R. 1928 Lah. 267 : 9 Lah. 106 : 112 I. C. 35, Mt. Viranwali v. Kundan Lal.

practically no chance to succeed to the property regarding which he had filed a declaratory suit. Moreover, it was not realised that a minor cannot be compelled to sue and no one is under a legal obligation to bring a suit on his behalf. When poverty of the nearer reversioner was regarded as a sufficient reason by their Lordships of the Privy Council in 47 ALL. 883⁸ to enable a more distant reversioner to maintain a declaratory suit there is no reason why minority should not be regarded as a disability of a similar type. Reliance was also placed on behalf of the respondents on 249 P. W. R. 1912⁹ and 80 I. C. 4.¹⁰ In both these rulings reliance was placed on 6 Cal. 764¹ and it was held that as collusion between the nearer reversioners and the vendees had not been established the remoter reversioners were not entitled to sue. The learned Judges regarded the list given in 6 Cal. 764¹ as exhaustive. The learned counsel for the respondents also relied on the case in 37 ALL. 45.¹¹ That was, however, a suit for possession of the property alleged to have been alienated by a widow. It was held that the plaintiff could not maintain the suit because a nearer reversionary heir was in existence and that it had not been established that the nearer heir had precluded himself from suing. No question of the minority of the nearer reversioner arose in the case. The following observations show that the suit was dismissed as it was one for possession and not for a mere declaration which would enure for the benefit of the entire reversionary body:

"There are two reasons either of which is sufficient to prevent that argument prevailing. The first has already been indicated, namely, that the relief asked for here was possession of the property, and that the declaration now sought for can scarcely be spelt out of the pleadings at all. But there is another objection which is equally fatal, and it is this. In 1904, when Mir Singh brought his suit, this deed of conveyance by the widow was not in existence, and therefore it is impossible to say that Mir Singh has, by his conduct in raising an action in 1904, precluded himself from challenging by way of declaration the deed which at that time was not in existence."

On a consideration of all the authorities cited at the bar I am of the opinion that the list given in 6 Cal. 764¹ of the exceptional circumstances in which the more remote

reversioners might bring a suit to challenge an alienation by the widow was merely illustrative and was not meant to be exhaustive. As a minor cannot bring a suit and as no one is under a legal obligation to institute a suit on behalf of the minor, the disability of the minor, when he happens to be the nearer reversioner, does not preclude a more remote reversioner from bringing a declaratory suit to the effect that a transfer of property will not affect his reversionary right when the succession opens out on the death of the widow. If a minor reversioner is allowed to bar the way of the more remote reversioners there would be a possibility that the more remote reversioners will be compelled to hold their hand and lose their opportunity of challenging the alienation within limitation through no fault of their own. This would be highly inequitable. I would accordingly answer the question referred to the Full Bench in the negative. The record will now be remitted to the Division Bench for the final disposal of the appeal.

Mahajan J. — I agree.

Khosla J. — I agree entirely with my learned brother Abdul Rashid J. and have only one word to add. When a suit is brought by a more remote reversioner in the presence of a nearer reversioner who is a minor, the following positions can arise: (a) The minor is impleaded as a party to the suit and when so impleaded, (i) supports the plaintiff's case, or (ii) does not support the plaintiff's case. (b) The minor is not impleaded as a party. The position (a) (i) presents no difficulty whatsoever. When the minor supports the plaintiff's claim, as in the case which has been referred to us, he may be transferred to the category of plaintiffs and the suit can proceed on behalf of the minor and the more distant reversioners. But even if the minor is not transferred to the category of plaintiffs, the suit is competent because the minor supports the claim of the more remote reversioners. (a) (ii) If the minor does not support the plaintiff's claim, the rule enunciated by their Lordships of the Privy Council in 6 Cal. 764¹ will apply and the next presumable reversioner would be entitled to sue on the ground that the nearer reversioner is concurring in the act alleged to be wrongful. (b) When the minor is not a party, it will be advisable to make him a party by directing the plaintiff to implead him and when this is done the remarks made above with regard to (a) (i) and (a) (ii) will apply. But even if the

8. (25) 12 A. I. R. 1925 P. C. 272 : 47 All. 883 : 28 O. C. 352 : 52 I. A. 398 : 91 I. C. 370 (P. C.), *Mata Prasad v. Nageshar Sahai*.

9. (12) 17 I. C. 379 : 249 P. W. R. 1912, *Barkat Ram v. Jagat Ram*.

10. (25) 12 A.I.R. 1925 All. 8 : 80 I. C. 4, *Bechu Pande v. Mt. Dulhama*.

11. (14) 1 A. I. R. 1914 P. C. 34 : 37 All. 45 : 27 I. C. 892 (P. C.), *Jhandu v. Tarif*.

minor is not made a party, he is suffering under a disability and this is a sufficient ground for allowing the next reversioner to institute a suit which enures for the benefit of the entire reversionary body, including the minor himself. This matter has, however, been ably discussed by Abdul Rashid J. and I cannot with advantage add anything further to it. I would, therefore, say that in all cases a more remote reversioner is competent to maintain a declaratory suit of this type in the presence of a nearer reversioner who is a minor and accordingly answer the question referred to the Full Bench in the negative.

R.K.

Answer accordingly.

[Case No. 2.]

A. I. R. (33) 1946 Lahore 6

MAHAJAN AND ACHRU RAM JJ.

Raghunath Dass — Defendant — Appellant

v.

Bhagwan Dass — Plaintiff — Respondent.

First Appeals Nos. 192 and 241 of 1942, Decided on 8th February 1945, from decree of Senior Sub-Judge, Gujranwala, D/- 23rd March 1942.

(a) Punjab Relief of Indebtedness Act (7 [VII] of 1934), S. 7 (2) — Person employed as Managing Director is not debtor within meaning of the Act.

A person who is managing a concern as a Managing Director is employed elsewhere and is not employed on agriculture and, therefore, is not earning his livelihood by agriculture though undoubtedly he is living on his income as a landlord, which really is not the income earned by him but is earned by others for him. Such a person is not entitled to the benefit of the provisions of Act 7 [VII] of 1934, as amended by Act 12 [XII] of 1940. [P 8 C 2]

(b) Usurious Loans Act (1918) (as amended by Punjab Act 7 [VII] of 1934 and Act 12 [XII] of 1940) — Agreement closing previous dealings within 12 years of transaction can be reopened.

Under the provisions of the Usurious Loans Act, the Court is bound to reopen any agreement purporting to close previous dealings and to create a new obligation which has been entered into by the parties within a period of twelve years from the date of the transaction. [P 9 C 1]

(c) Civil P. C. (1908), S. 35 — Government added party at its own request is not entitled to costs though successful by objection about validity of Act failing.

Where Government has been made a party on its own request though undoubtedly the point in which it becomes interested has been raised by the plaintiff, it is no ground to burden the plaintiff with costs of the Government. It is the duty of the Government to intervene in proceedings where a challenge is thrown to its legislation. That by itself would not entitle the Government to its costs

if it is successful and the objection that is raised against it fails. [P, 9 C 2]

(d) Civil P. C. (1908) S. 35 — Act reducing amount of claim not in force on date of suit— Plaintiff may not be saddled with costs of other side but cannot claim costs for claim not allowed.

The contention that at the time when the plaintiff brought his suit, Act 12 [XII] of 1940, had not been enacted and, therefore, he could not be blamed if he sued for the amount claimed by him in the plaint may furnish a ground for contending that he should not be burdened with costs of the other party but that is no ground to give him costs on a higher claim than is eventually decreed in his favour. [P 9 C 2]

Dr. Shuja-ud-Din and Mohd. Jamil —
for Appellant.

Shamir Chand and Iqbal Singh —
for Respondent.

Mahajan J. — These two cross appeals Nos. 192 of 1942 and 241 of 1942 arise out of a suit instituted by Bhagwan Das plaintiff on the foot of two mortgage-deeds executed by Raghunath Das in his favour on 17th May 1930, each for a sum of Rs. 3000. The brief facts of the case are that on 24th August 1926, Raghunath Das executed a mortgage-deed, Ex. P-39, for a consideration of Rs. 3000 in favour of Lala Bhagwan Das. This mortgage-deed carried interest at the rate of Rs. 1-1-0 per cent. per mensem. On 17th May 1930, a registered document was executed between the parties by which interest was reduced from Rs. 1-1-0 per cent. per mensem to Re. 0-13-0 per cent. per mensem on the mortgage of 1926. On the same date another mortgage was executed for a consideration of Rs. 3000 by Raghunath Das in favour of Bhagwan Das. The consideration of Rs. 3000 was comprised of a sum of Rs. 1750 as interest on the mortgage of 24th August 1926 and Rs. 1250 was paid before the Sub-Registrar. The interest on the second mortgage was also at the rate of Re. 0-13-0 per cent. per mensem. The mortgages were with possession and the income of the mortgaged land was to be adjusted towards interest.

The plaintiff alleged in his plaint that actual possession of the property was delivered to him in Rabi 1934 and that the defendant had paid him Rs. 90 on 25th July 1933 and Rs. 48 on 18th August 1934 and that he had realised a sum of Rs. 2520-2-0 in all including these sums from the produce of the land. He further alleged that he was entitled to a sum of Rs. 380-4-6 as land revenue paid by him and Rs. 185-15-9 on account of various expenses. After allowing credit for the amount of the income realised after deducting the expenses, the plaintiff

claimed a sum of Rs. 12,000. Interest was charged by him on his claim from 17th May 1930 up to the date of the suit at the rate of Re. 0-12-0 per cent. per mensem, that is, Rs. 9 per cent. per annum as allowed by law at that time.

The defendant admitted the execution of the mortgage-deeds and the consideration of Rs. 4250. He also admitted that Rs. 1750 were included in the subsequent mortgage as interest due on the previous mortgage. He further contended that the plaintiff was not entitled to the rate of interest as mentioned in the mortgage-deed because he was a debtor within the meaning of Act No. 7 [VII] of 1934 and Act No. 12 [XII] of 1940, and the plaintiff was not entitled to interest at a rate higher than Rs. 7-8-0 per cent. per annum. It was further pleaded that the plaintiff could not recover more than twice the amount originally advanced in view of the provisions of S. 30, Relief of Indebtedness Act. The defendant also pleaded that the plaintiff was a sahuکار and under the Regulation of Accounts Act he had not submitted the monthly statement of account and, therefore, he was not entitled to any costs or interest from the date of the suit. A further plea was taken that possession of the mortgaged land was delivered to the plaintiff in Kharif 1926 and that had the plaintiff acted prudently in managing the mortgaged land he would have received not less than Rs. 450 per annum as net profits of the land.

On the pleadings of the parties as many as 11 issues were framed, but it is unnecessary to mention all of them in this judgment. The Subordinate Judge held that the provisions of the Regulation of Accounts Act had no application whatsoever to the facts of this case, because mortgages were outside the contemplation of that Act. That matter really was conceded by the defendant's counsel in the Court below. A point had been raised that Act No. 7 [VII] of 1934 and Act No. 12 [XII] of 1940 were ultra vires of the Punjab Legislature so far as retrospective effect was concerned. That point was also not pressed. The principal point that was argued before the Subordinate Judge was that the defendant was a debtor within the meaning of Act No. 7 [VII] of 1934 and Act No. 12 [XII] of 1940. On this point, the learned Judge held that the defendant was outside the definition of the word 'debtor' as given in S. 7 of Act No. 7 [VII] of 1934. He held that he was employed as a managing director of a concern at Jogindernagar and

was not earning his livelihood from land. It was further held that there was no proof as to the actual extent of the land owned by him and the income of that land. The defendant had neither placed all the revenue records concerning his land on the file nor had he produced any statement of accounts regarding the income that he gets out of this land on the present record. The learned Judge, therefore, held that, in view of the fact that the best evidence in the case had not been produced, he was not prepared to rely on the oral evidence led by the defendant to prove his income from the land and the area of unencumbered land held by him. On the question whether the plaintiff was entitled to charge interest at Rs. 9 per cent. per annum, the learned Subordinate Judge held that he was not so entitled because the provisions of Act No. 12 [XII] of 1940, which have reduced the interest from Rs. 9 to Rs. 7-8-0 per cent. per annum, were retrospective. He held in favour of the plaintiff on the point that the amount of Rs. 1750 as interest on the mortgage of 1926 included as a part of the consideration in the mortgage of 17th May 1930, could not be questioned as the interest charged was that which was allowed by law at that time. A point had been raised that the mortgage was usufructuary and, therefore, there was no personal liability and a suit for sale could not be maintained. The learned Judge held that it was an anomalous mortgage and, therefore, a suit for sale was competent. Regarding the income of the land the learned Judge reached the conclusion that the plaintiff had entered into possession of the property in Rabi 1934 as alleged by him and not in 1926 as pleaded by the defendant. He arrived at the conclusion that no negligence had been proved by the defendant in the management of the mortgaged property and the total income realised by the plaintiff was as shown in his account books, that is, a sum of Rupees 2003-13-9, after deducting the expenses. To this sum an item of Rs. 68 was added on the ground that there was no independent evidence as to this amount having been spent by the plaintiff in the management of the mortgaged property. The result was that a total reduction of Rs. 2071-13-9 was allowed to the defendant as against interest. The result was that the plaintiff's suit was decreed for Rs. 8528-2-3 and a preliminary decree for that sum with proportionate costs under the provisions of O. 34, R. 4 was granted to him. Further interest was also allowed at the rate of Rs. 7-8-0 per cent. per annum on

the principal amount from the date of the institution of the suit to the date of realization in full. As the Punjab Government had been impleaded as a party at its request and it had been found that the Acts in question were not ultra vires, the learned Judge allowed costs to the Government against the plaintiff. From the decree of the Subordinate Judge both parties have appealed to this Court.

It will be convenient to deal with the defendant's appeal first (R. F. A. No. 192 of 1942). The first point urged by Dr. Shuja-ud-Din on behalf of the appellant was that the finding of the Subordinate Judge that he was not a debtor as defined in Act No. 7 [VII] of 1934 is erroneous. The learned counsel contended that his client though he was working as a managing director in a concern at Jogindernagar was receiving nothing by way of remuneration from that concern and that the evidence of his brother directors should have been believed. The learned Subordinate Judge held that the company's books which were in possession of the defendant and his brother directors had not been produced. Those books would have shown whether the defendant was being paid any remuneration or not. In my view, the learned Subordinate Judge in the absence of the best evidence, which was in the power of the defendant, was entitled to hold — and rightly — that the oral evidence on this question could not be accepted. It is highly unlikely that for four years the defendant would act as a managing director of a concern and live at Jogindernagar and do the work gratis. The learned counsel further argued that his client held considerable area of land and his main source of livelihood was the income from that land. He again neither produced the revenue records which could prove the extent of the area of land held by him nor the accounts of the income from that land. Again, for want of best evidence oral evidence of the area of the land held by him and of its income, in my view, was rightly rejected by the Subordinate Judge. Apart from these considerations, it seems to me that on the defendant's own admission that he is acting as a managing director of a concern since four years, he is outside the definition of the word 'debtor' as given in S. 7 (2), Relief of Indebtedness Act. That definition is in these terms:

" 'Debtor' means a person who owes a debt and (i) who both earns his livelihood mainly by agriculture and is either a landowner, or tenant of agricultural land, or a servant of a landowner, or of a tenant of agricultural land; or (ii) who earns

his livelihood as a village menial paid in cash or kind for work connected with agriculture; or (iii) whose total assets do not exceed five thousand rupees :

Provided that a member of a tribe, notified as agricultural under the Punjab Alienation of Land Act, 1900, shall be presumed to be a debtor as defined in this section until it is proved that his income from other sources is greater than his income from agriculture.

Explanations : (i) A debtor shall not lose his status as such through involuntary unemployment or on account of incapacity, temporary or permanent, by bodily infirmity or, if he is or has been in service of His Majesty's Military or Naval or Air Forces, only on account of his pay and allowances or pension exceeding his income from agricultural sources. (ii) A debtor shall not lose his status as such by reason of the fact that he makes income by using his plough cattle for purposes of transport. (iii) A debtor shall not lose his status as such only because he does not cultivate with his own hands."

In my view on the plain language of this definition, it is clear that before a person can fall within the ambit of the definition he must both earn his livelihood from agriculture and be a landowner. The defendant may be a landowner but when he is employed elsewhere, he cannot be held to be earning his livelihood mainly by agriculture. Every person who owns land and is not a member of an agricultural tribe is not within the definition of the word 'debtor' unless it is further proved that he earns his livelihood by agriculture. The meaning to be given to the word 'earn' in this definition becomes plain when one refers to the explanations appended to the section. The section includes within the ambit of definition persons who are involuntarily unemployed on account of incapacity or persons serving in His Majesty's Military, Naval or Air Forces. This obviously means that persons otherwise unemployed than owing to either of these excuses but who are employed elsewhere than on agriculture are outside the purview of the definition of the word 'debtor' as given in this section. A person who admittedly is managing a concern as a managing director is employed elsewhere and is not employed on agriculture and, therefore, is not earning his livelihood by agriculture though undoubtedly he is living on his income as a landlord, which really is not the income earned by him but is earned by others for him. For this reason also, in my view, the defendant was not entitled to the benefit of the provisions of Act No. 7 [VII] of 1934 as amended by Act No. 12 [XII] of 1940.

Dr. Shuja-ud-Din in this appeal wished to point out certain errors in the accounts and particularly mentioned an item of Rs. 108 which was entered in the accounts of the

plaintiff himself, and he claimed that he had not been given credit for this amount. This amount was not claimed by him in the written statement, was not mentioned by him before the Judge below and was not specifically claimed in the grounds of appeal to this Court. No question about this amount was put to the plaintiffs. So far as I am able to see most likely this item is included in the result of these accounts though it cannot be explained in the absence of evidence on that point. This contention of Dr. Shuja-ud-Din therefore fails and is repelled.

The only other point that Dr. Shuja-ud-Din urged was that the item of Rs. 1750 entered on account of interest at the rate of Rs. 1-1-0 per cent. per mensem in the mortgage of 17th May 1930 should have been re-opened in view of the clear provisions of the Usurious Loans Act as amended by S. 5, Punjab Relief of Indebtedness Act (Act No. 7 [VII] of 1934 and Act No. 12 [XII] of 1940). According to the provisions of these two statutes, the rate of interest in suits pending or instituted after their commencement cannot be granted a higher rate than Rs. 7-8-0 per cent. per annum and any rate other than the one mentioned by the statutes must be regarded to be excessive under the provisions of the Usurious Loans Act. This suit certainly was instituted in the year 1940 and was pending when Act No. 12 [XII] of 1940 came into force. Section 6 of the Act has made the application of Act No. 12 [XII] of 1940 retrospective. Therefore, the present case was clearly governed by the provisions of Act No. 12 [XII] of 1940 and the plaintiff could not claim interest at a higher rate than Rs. 7-8-0 per cent. per annum. The learned Subordinate Judge allowed him interest at that rate from the date of 17th May 1930, that is, the date of both these mortgages in suit, but he declined to re-open the account from 1926 to 1930 concerning the item of Rs. 1750. In my view, this view of the learned Subordinate Judge cannot be sustained. Under the provisions of the Usurious Loans Act, the Court is bound to re-open any agreement purporting to close previous dealings and to create a new obligation which has been entered into by the parties within a period of 12 years from the date of the transaction. The interest of Rs. 1750 contravened the mandatory provisions of S. 5, and there was no option in the Court to regard the interest of Rs. 1-1-0 per cent. per mensem as fair even if it was allowable by the law then prevailing. In my view therefore the plaintiff was only entitled to interest at Rs. 7-8-0 per cent. per annum

from August 1926 to 17th May 1930 and he was entitled to the interest on the consolidated sum at that very rate up to the date of the suit. The defendant's appeal, therefore, must be allowed to this extent. He is entitled to relief for excessive interest that was charged on the foot of the mortgage of 24th August 1926 and was included in the mortgage of 17th May 1930.

So far as the plaintiff's appeal is concerned, four matters have been argued in this appeal. The first question that was argued was that Government should not be allowed its costs against the plaintiff. Government was made a party on its own request though undoubtedly the point in which it became interested was raised by the plaintiff. That however is no ground to burden the plaintiff with costs of the Government. It is the duty of the Government to intervene in proceedings where a challenge is thrown to its legislation. That by itself would not entitle the Government to its costs if it is successful and the objection that is raised against it fails. Now, the matter is covered by an Act of the Legislature (Act No. 23 [XXIII] of 1942). That Act has no retrospective operation but it undoubtedly is based on the principle that in such cases no costs should be allowed by Courts. Following the principle of the legislation I am inclined to hold that the decision of the Subordinate Judge allowing costs to the Government must be set aside.

Mr. Shamair Chand argued that his client should have been given full costs and not proportionate costs on the decretal amount. He contended that at the time when he brought his suit, Act No. 12 [XII] of 1940 had not been enacted and therefore he could not be blamed if he sued for the amount claimed by him in the plaint and therefore he was entitled to the full costs though the claim was reduced by an Act of the Legislature. That argument may furnish a ground to the learned counsel for contending that he should not be burdened with the costs of the other party but that certainly is no ground to give him costs on a higher claim than is eventually decreed in his favour. This contention of the learned counsel is therefore repelled.

Mr. Shamair Chand contended that the learned Subordinate Judge has allowed credit of an item of Rs. 68 to the defendant by an error. This contention of the learned counsel seems to be right. In para. 7 of the plaint it was stated that besides the income and the expenses mentioned in the accounts

of the mortgagee, the plaintiff had spent from his pocket Rs. 68 in connexion with the realization of rent from the year 1934 up to the present but the amount was inadvertently omitted to be entered in the account books. The plaintiff wished this amount to be deducted from the income. The learned Subordinate Judge instead of deducting this amount from the income has added it to the income on the ground that the amount has not been proved. There seems to be some confusion on this point and by an oversight the defendant has been given credit for the sum of Rs. 68 more than he was entitled. To this extent the plaintiff's appeal is allowed. Finally, Mr. Shamair Chand argued that certain unnecessary printing fee had been charged from him for printing documents which the other side was responsible for. In my view there is not sufficient material to grant any relief to the plaintiff on this score and the point raised is without any force. The result, therefore, is that the defendant's appeal succeeds inasmuch as he is given relief regarding excessive interest included in the sum of Rs. 1750. The plaintiff's appeal succeeds to the extent that he is allowed a credit for the sum of Rs. 68 and the order passed against him for costs of the Government is set aside.

The parties have agreed that as a result of our findings a decree for a sum of Rs. 7000 in round figures should be passed in the plaintiff's favour against the defendant and the preliminary decree granted by the Subordinate Judge for Rs. 8528-2-3 should be reduced to Rs. 7000. I would, therefore, allow both these appeals and pass a preliminary decree under O. 34, R. 4, Civil P. C., for a sum of Rs. 7000 with proportionate costs in both the Courts in favour of the plaintiff against defendant 1. He will be entitled to future interest as allowed by the Subordinate Judge at the rate of Rs. 7-8-0 per cent. per annum on the principal amount from the date of the institution of the suit to the realization in full. The defendant shall pay the decretal amount and costs by 1st April 1945, failing which the plaintiff will be entitled to apply for a final decree.

Achhru Ram J. — I agree.

R.K.

Order accordingly

[Case No. 3.]

A. I. R. (33) 1946 Lahore 10

MAHAJAN AND ACHHRU RAM JJ.

Akhtar Abbas and others — Plaintiffs
— *Appellants*

v.

Nazar Abbas and others — Defendants
— *Respondents.*

First Appeal No. 235 of 1941, Decided on 8th February 1945, from decree of Senior Sub-Judge, Gurgaon, D/- 3rd July 1941.

(a) Custom (Punjab)—Succession—Widow succeeding to property collaterally in her husband's family—On death of widow succession is to be traced to her husband and not to collaterals from whom she inherited it.

According to the general custom of the Province where a widow succeeds collaterally in her husband's family she does so as representative of her husband and the land which she gets by means of such collateral succession becomes an accretion to her husband's estate and on her death succession is to be traced to her husband and not to the collaterals who held the land before it devolved upon her. The application of this principle is not in any manner affected by the degree of relationship of the contesting collaterals or by the nature of the property which forms the subject-matter of controversy: ('44) 31 A. I. R. 1944 Lah. 72; ('38) 25 A. I. R. 1938 Lah. 111 and ('37) 24 A. I. R. 1937 Lah. 468, *Rel. on*; *Case law discussed.*

[P 14 C 1]

(b) Practice—Pleadings — Relief — Party is not to plead law but to state material facts constituting cause of action—It is for Court to apply correct rule of law and give appropriate relief.

It is not the duty of a party to plead law in the pleadings. All that is required of him is to state all the material facts which constitute his cause of action. When the material facts have been stated, the duty of giving appropriate relief according to the facts established on the record devolves on the Court which has to apply the correct rule of law to such facts. Therefore, where a party claimed relief on the ground of a special custom there is nothing to preclude the Court from applying the correct rule of law and giving appropriate relief.

[P 14 C 1, 2]

C. P. C. —

('44) Chitale, O. 7, R. 7, N. 2, Pts. 1, 6; O. 6, R. 2, N. 2, Pt. 1; N. 3, Pts. 1, 3.

('41) Mulla, Page 606, Pt. (d); Page 571, Pts. (j), (k); Page 572, Pts. (s) (u).

M. Barkat Ali and Mohd. Jamil —

for Appellants.

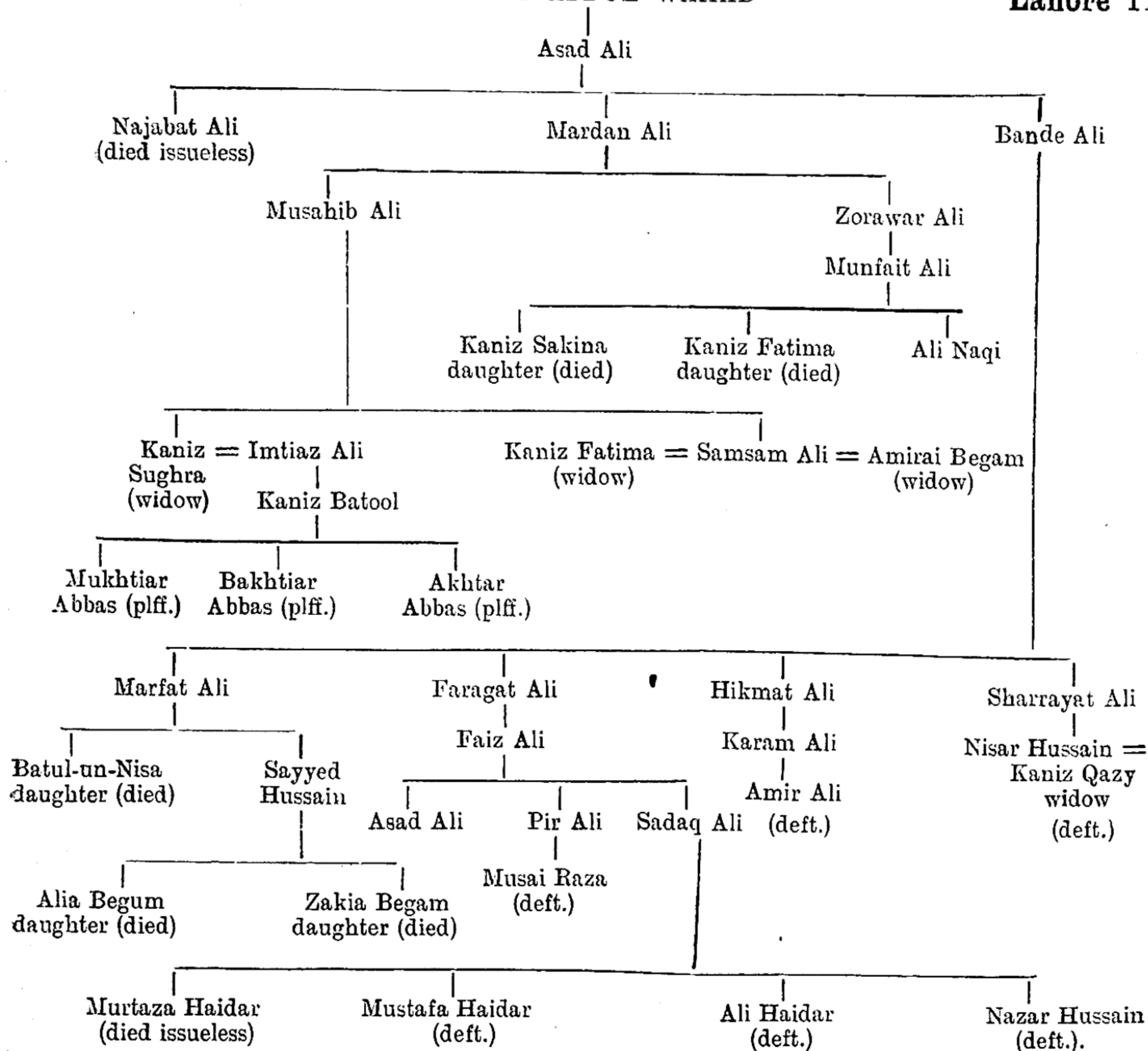
F. C. Mital and Sh. Abdul Aziz —

for Respondents.

Achhru Ram J. — The parties to this appeal are Shia Sayyeds of village Rasulpur in Gurgaon District. Their relationship will appear from the following pedigree table:

(See pedigree on page 11.)

309 bighas and 11 biswas pukhta of land situate in Rasulpur originally belonged to



Mardan Ali on whose death it devolved upon his two sons Musahib Ali and Zorawar Ali. On the death of Ali Naqi, the grandson of Zorawar Ali, his half share of the land devolved upon Mt. Kaniz Fatima. This lady was married to Samsam Ali, one of the two sons of Musahib Ali, and on her husband's death without any children she, along with her co-widow Mt. Amirai Begum, succeeded to his one-fourth share in the holding. On the remarriage of Mt. Amirai Begum, her co-widow, some time in 1912, she became entitled to the entire one-fourth share of the holding left by her husband. She thus became the owner of 3/4th share in the holding, one-half inherited by her in her father's family and one-fourth inherited by her from her husband. She died in 1913 and on her death there was a triangular dispute as to the land left by her. Mt. Kaniz Sughra, widow of Imtiaz Ali, claimed a right to succeed to the entire land as the representative of her husband Imtiaz Ali. The descendants of Bande Ali claimed a right to succeed as the collaterals of Samsam Ali and Ali Naqi. Mt. Kaniz Batool, daughter

of Imtiaz Ali, also set up a right as a daughter of the nearest collateral of the last male holder of the land. The Assistant Collector negatived the claim of Mt. Kaniz Batool and the descendants of Bande Ali and mutated the entire land left by Mt. Kaniz Fatima in the name of Mt. Kaniz Sughra as the widow of Imtiaz Ali. On an appeal by the descendants of Bande Ali, the Collector set aside the order of the Assistant Collector and ordered mutation in the names of the appellants. Mt. Kaniz Sughra appealed to the Commissioner, who by his order, dated 11th February 1914, set aside the Collector's order and restored that of the Assistant Collector sanctioning mutation in her name of the entire land left by Mt. Kaniz Fatima: *Vide* Ex. D-6, p. 51, Vol. IV.

Mt. Kaniz Sughra died on 15th December 1935. On her death, there was a contest between Mt. Kaniz Batool and the descendants of Bande Ali as to the right to succeed to the land held by her. Mt. Kaniz Batool died on 2nd June 1936, and her place in the contest was taken by her sons. On 21st February 1938, the Assistant Collector ordered

mutation of the entire land in favour of the sons of Mt. Kaniz Batool. On 25th May 1938, the Collector allowed the appeal of the descendants of Bande Ali and made an order for the mutation of the entire land in their favour. The sons of Mt. Kaniz Batool went up in appeal to the Commissioner who ordered mutation of one-fourth of the holding which Mt. Kaniz Sughra had inherited from her own husband Imtiaz Ali in the names of the sons of Mt. Kaniz Batool, while the mutation in respect of the remaining 3/4th share of the holding which she had inherited from Mt. Kaniz Fatima was sanctioned in the names of the descendants of Bande Ali. On 2nd March 1940, the sons of Mt. Kaniz Batool brought the suit giving rise to the present appeal against the descendants of Bande Ali for a declaration of their title to the 3/4th share of the holding which had been mutated, in consequence of the Commissioner's order, in the latter's names. On a preliminary plea taken by the defendants as to the incompetency of the suit for a declaration the trial Judge held, on 16th November 1940, that out of the land in dispute 6 bighas and 8 biswas had been proved to be in the possession of the defendants in respect of which the plaintiffs had to sue for possession and that the suit as framed was competent in respect of the remaining land. On this the plaintiffs amended their plaint on the 26th November 1940 and sued for possession of 6 bighas and 8 biswas of land that had been found in the defendants' possession, and for a declaration of title in respect of the remaining land. The suit was resisted by the defendants on the pleas that the parties' family was governed by custom, that according to the custom applicable to the parties the plaintiffs were not entitled to succeed to the land in suit which was ancestral qua the defendants, and that by reason of their mother Mt. Kaniz Batool not having contested the mutation order of 1914 by means of a regular suit they were estopped from maintaining the present suit. On the pleadings of the parties, the learned trial Judge framed the following issues :

(1) Are parties governed by Mahomedan law as modified by family custom in matter of succession? If so, what is that custom?

(2) If first issue is not proved, are parties governed by custom of the village or the district? If so, what is that custom?

(3) Is the property ancestral qua the defendants?

(4) Did Mt. Kaniz Batool succeed to the property?

(5) Are the plaintiffs entitled to succeed to the whole or any part of the property?

(6) Are plaintiffs estopped from asserting their right of ownership inasmuch as in disputes against Mt. Kaniz Batool they failed and did not take further steps to establish their right?

The last issue does not appear to have been correctly framed, because the plea of the defendants on which this issue was founded was not that the plaintiffs had failed to take any further steps in reference to the disputes against Mt. Kaniz Batool. The plea in fact was that Mt. Kaniz Batool had not taken any steps to contest the mutation order of 1914 by which her right to succeed to the property left by Mt. Kaniz Fatima was negatived. The issue was decided against the defendants and has not been pressed before us. It is, therefore, needless to say anything more about this matter. On the other issues, the learned Subordinate Judge held that the parties were governed by general agricultural custom in matters of succession, that the land in dispute was ancestral qua the defendants, and that the plaintiffs had failed to prove any special custom according to which they could claim a right to succeed to the collaterals of their maternal grandfather or to the land inherited by their maternal grandmother from such collaterals, although they had an indisputable right to succeed even to the ancestral land left by their own maternal grandfather. On these findings, the plaintiffs' suit was dismissed. They have come up in appeal to this Court.

In my judgment, the learned trial Judge has failed to approach the consideration of the case from a correct point of view. The question that really required determination in the present case was not whether the plaintiffs had succeeded in establishing a custom entitling them to succeed to the property of the collaterals of their maternal grandfather. The real question that arose for decision was what was the nature of Mt. Kaniz Sughra's estate in the land to which she succeeded collaterally in her husband's family on the death of Mt. Kaniz Fatima, and to whom was the succession to such property to be traced on her death, whether to her husband Imtiaz Ali or to the collaterals of Imtiaz Ali from whom Mt. Kaniz Fatima had inherited the same. So far as this question is concerned, we have the authority of four Division Bench judgments of this Court which lay down that according to the general custom of the province where a widow succeeds collaterally in her husband's family, the succession on her death to the property so inherited by her

is to be traced to her own husband. In Civil Appeal No. 1090 of 1912 decided on 6th May 1916, Mt. Rumal Devi, the daughter of one Amar Singh, on the death of the latter's widow Mt. Partapi was allowed to succeed not only to the land left by her own father but also to the land inherited by Mt. Partapi on the death of the widow of one Atar Singh, a collateral of her husband in the third degree. In dealing with the question of Mt. Rumal Devi's right to succeed to the property of Atar Singh, the learned Judges made the following observations:

"Turning now to the estate of Atar Singh, we find that Mt. Partapi succeeded to his estate collaterally in her capacity of representative of her deceased husband. It is always dangerous to generalise on incidents of Customary law but after due consideration it appears to us that the estate inherited from Atar Singh by Mt. Partapi must be regarded as the estate of her husband Amar Singh. She herself had no independent right to succeed to Atar Singh and her succession to Atar Singh had for basis the rights of her husband Amar Singh. Had Amar Singh been alive at the death of Atar Singh, he would of course have succeeded and on his death his consolidated estate would have devolved first upon his widow Mt. Partapi and failing near collaterals on her death upon his daughter Mt. Rumal Devi. By a fiction of custom Mt. Partapi is a representative of her husband and her consolidated estate must therefore be regarded as the estate of her husband Amar Singh."

The same question again arose in A. I. R. 1937 Lah. 468¹ decided by Coldstream and Bhide JJ. In that case, Mt. Utmi, widow of Prem Singh, succeeded collaterally to the land of her husband's brothers Jowala Singh and Mihan Singh. On her death the question arose whether her daughter's sons Diwan Singh and Waryam Singh were entitled to claim this land as against the collaterals of Jowala Singh and Mihan Singh remoter than Prem Singh. After holding that, by reason of the land being non-ancestral, the daughter's sons were entitled to succeed to the land inherited by Mt. Utmi from Prem Singh as against the latter's collaterals, their Lordships held that the land inherited by Mt. Utmi from Jowala Singh and Mihan Singh was also to be treated as a part of the husband's estate and should go to the daughter's sons in preference to the collaterals. The following observations from the judgment of Bhide J. may be quoted with advantage:

"The main point which requires decision in the circumstances is whether on the death of Mt. Utmi this land should be treated as the property of her husband Prem Singh, or that of his brothers Jowala Singh and Mihan Singh, who were the actual last

male holders of the land, in order to determine the line of succession on her death. The contention of the learned counsel for the appellants was that the land should be treated as an accretion to the estate of Mt. Utmi's husband Prem Singh, as she succeeded to it only as a representative of her husband's estate and not in any independent right of her own. There seems to be ample authority to support the contention of the learned counsel that when a widow succeeds collaterally as in this case, she does so as a representative of her husband and in the same way as he would have done if he were alive: *cf.* 43 P.R. 1905;² 51 P.R. 1909.³ In 5 Lah. 1924⁴ it was held by their Lordships of the Privy Council that when a widow acquires property by adverse possession in her capacity as such, the property becomes an accretion to her husband's estate and will be treated as his property. I do not see why the same principle should not govern the present case."

Reference was also made to the judgment of Shadi Lal and LeRossignol JJ. in Civil Appeal No. 1090 of 1912 and the principle laid down in that judgment was approved. In A. I. R. 1938 Lah. 111,⁵ Dalip Singh and Skemp JJ. also took the same view. In dealing with this question, Dalip Singh J. made the following observations:

"But assuming that this was so, the next question that arises is whether on Mt. Hukam Kaur's death it is the heirs of her husband who have to be traced or the heirs of the last male holder Bur Singh. On this point which is by no means free from difficulty, we have fortunately two authorities to guide us. One is Civil Appeal No. 1090 of 1912 where the same point arose for decision, namely, whether in a case where a widow has succeeded collaterally as it is called after her death, the heirs of her husband are to be sought or the heirs of the last male holder of the property. It was held in that case that as the widow's right is only a fictitious extension of her husband's right, it is the heirs of the husband who should be sought for on the death of the widow. This Civil Appeal was followed in Civil Appeal No. 160 of 1935 (A. I. R. 1937 Lah. 468¹) by a Division Bench of this Court. I see no reason to differ from these rulings and respectfully following them I would hold that on Mt. Hukam Kaur's death it is the heirs of her husband who have to be sought for and not the heirs of Bur Singh as contended by the learned counsel for the appellants."

These two judgments appear to have been brought to the notice of the learned Subordinate Judge during the course of arguments. He has distinguished A.I.R. 1937 Lah. 468¹ on the ground that the dispute there was about non-ancestral land and related to Labanas of Tahsil Shahdara in the Sheikhpura District. He has distinguished A.I.R. 1938 Lah. 111⁵ on the ground that it was a

2. ('05) 43 P. R. 1905, Anar Devi v. Kaulan.

3. ('09) 51 P. R. 1909, Gurdial Singh v. Arur Singh.

4. ('24) 11 A. I. R. 1924 P. C. 121 : 5 Lah. 192 : 51 I. A. 171 : 80 I. C. 788 (P. C.), Lajwanti v. Safa Chand.

5. ('38) 25 A. I. R. 1938 Lah. 111 : 177 I. C. 420, Mt. Gango v. Mt. Hukam Kaur.

1. ('37) 24 A. I. R. 1937 Lah. 468 : 173 I. C. 993, Diwan Singh v. Natha Singh.

case of Sansi Jats of Amritsar in which collaterals of seventh degree were contesting the claim of the daughters. From the passages quoted above, it will be quite clear that it is not possible to distinguish these two judgments on the grounds given by the learned Judge. The decision in both of them did not proceed on the ground of the land being non-ancestral or the collaterals being remotely related. The principle laid down in them was that where a widow succeeds collaterally in her husband's family, the land which she gets by means of such collateral succession becomes an accretion to her husband's estate and on her death succession is to be traced to her husband and not to the collaterals who held the land before it devolved upon her. The application of this principle is not in any manner affected by the degree of relationship of the contesting collaterals or by the nature of the property which forms the subject-matter of controversy. The proposition laid down in the above mentioned three Bench cases was affirmed quite recently in another Division Bench judgment in 46 P. L. R. 9.⁶ My learned brother wrote the judgment in that case and in dealing with the present question he made the following observations:

"Another point was raised by Mr. Pandit, and that was that the estate left by Shah Mohammad could not be regarded as the estate of Din Mohammad, the father of defendants 2 and 3, and the daughters had no right to their uncle's property. It seems to me that this argument has no force in view of the past decisions of this Court to the effect that when a widow succeeds collaterally, the estate that she gets becomes for the purpose of inheritance the estate of her husband and for all future purposes is treated as the husband's estate."

Mr. Faqir Chand Mital, the learned counsel for the respondents, did not contend that the present case was not within the principle of the above quoted judgments. He urged in the first instance that the plaintiffs rested their claim in the plaint not on any rule of custom according to which the land inherited by Mr. Kaniz Sughra from the collaterals of her husband was to be treated as a part of her husband's estate but on a special family custom giving a daughter the right to succeed collaterally in the family of her father. He contended that the parties having gone to trial on the special custom alleged by the plaintiffs it would not be just or fair to allow the latter to succeed on the ground now urged. I, however, do not see any force in this contention of the learned counsel. It is not the duty of a party to plead law

in the pleadings. All that is required of him is to state all the material facts which constitute his cause of action. It is not disputed that all the material facts on which the plaintiffs are now claiming relief are stated in the plaint. When the facts have been so stated, the duty of giving appropriate relief according to the facts established on the record devolves on the Court which has to apply the correct rule of law to such facts.

Mr. Mital contended that if the matter had been raised in the pleadings, he might have pleaded and proved a special custom inconsistent with the rule of general custom laid down in the above mentioned authorities. This contention of the learned counsel is equally without force. There is no question of any general customary rule in the present case against which a special custom might be pleaded and proved. The question really is one relating to the incidents of collateral succession by the widows where such collateral succession is permitted by custom. In all cases where a widow succeeds to the collaterals of her husband, according to the above mentioned authorities, she succeeds as his representative and the property which she gets is treated as a part of the husband's estate for the purposes of succession. The application of this rule cannot be displaced by proof of any special custom.

Mr. Mital further contended that the aforesaid Division Bench judgments of this Court do not lay down correct law and were not correctly decided. He was, however, unable to show us any good ground for disagreeing with the view of law taken in the above mentioned authorities. He urged that where a female succeeds to a life estate the succession on her death has got to be traced to the last male holder of the property who according to him in cases of this nature is not the widow's husband but the collateral to whom the widow has succeeded. This argument, however, fails to take note of the fact that the widow of a collateral in her own right is not an heir to such collateral. As pointed out in 1 Lah. 433,⁷ custom does not recognise any female relation other than a widow, a mother and in some cases a daughter and in very rare cases a sister as an heir. Where the widow of a collateral is permitted to succeed, she does so not in her own right or by virtue of her own relationship with the deceased owner but as

6. ('44) 31 A.I.R. 1944 Lah. 72 : 214 I. C. 34 : 46 P. L. R. 9, Qamar-ud-Din v. Mt. Fateh Bano

7. ('20) 7 A.I.R. 1920 Lah. 240 : 1 Lah. 433 : 58 I. C. 986, Jiwi v. Sandhi.

representing her husband. The last male holder in such cases is the widow's husband and not the collateral who originally owned the property because it is by reason of being the widow of her husband that she succeeds to the property. In 5 Lah. 450⁸ it has been held that the estate of a widow under custom is subject to the same limitations as her estate under Hindu law and the Privy Council in 5 Lah. 192⁴ has definitely laid down that a Hindu widow, even where she possesses any property adversely, does not acquire such property as her stridhan but makes it good to her husband's estate. The above mentioned judgments merely apply the principle laid down by the Judicial Committee to the case of a widow getting property by means of collateral succession in the husband's family.

Mr. Mital drew our attention to the fact that in some reported cases it has been laid down that a mother on the death of her son childless and without a widow succeeds to his estate as the widow of her own husband. He referred to the Full Bench judgment in 134 P. R. 1907⁹ and contended that on the mother's death the succession is traced not to her husband but to her son who is considered to be the last male holder. He urged that the Division Bench judgments mentioned above were opposed to the view taken by the Full Bench in the above mentioned case. This contention of the learned counsel, however, does not appear to be either sound or well founded. The mother has a well recognised right under custom to succeed to the property of her son on the latter dying without any son and without a widow. It is only with reference to the effect of remarriage on her right to retain possession of the property inherited by her from her son that she is treated as having succeeded as the widow of her husband. The implication of the cases in which a mother has been regarded as having succeeded as the widow of her husband cannot be extended to cover the case of a widow succeeding collaterally in the husband's family who unlike the mother except as the widow of her husband has no right to succeed at all. A Division Bench consisting of Shadi Lal C. J. and Coldstream J., had to deal with a similar argument in A.I.R. 1931 Lah. 677.¹⁰ In deal-

ing with this argument, the following observations were made by Coldstream J., at page 684 :

"It is certainly settled rule that a widow succeeding collaterally to ancestral property must remain unmarried and chaste to preserve her life estate but the rulings on the point do not appear to me to warrant the wide proposition that in no case can a woman who appears to be a widow succeed to ancestral property by virtue of her own relationship to the last male heir. Strong authority against it is to be found in the Full Bench judgment of the Chief Court in 134 P. R. 1907,⁹ where it was laid down that among parties following customary law the position of a sister of a male proprietor without issue cannot be assimilated for purposes of inheritance to that of a daughter and she must therefore in such matters be regarded as a sister of that proprietor and not as a daughter of his father. The remarks relied on by Mr. Badri Das were no more than an endeavour to find a logical basis for the custom by which women lost their life estate by remarriage. That women can inherit collaterally otherwise than as representatives of husbands under the general customary law is well established.

In the present case it is not disputed that Mt. Nur Bhari held a limited estate nor that, if a widow in her capacity as such acquires property, that property will attach to her husband's estate, see 5 Lah. 192.⁴ But that principle obviously has no application where a widow does not succeed as representative of her husband. Hassan Shah was never owner of the property and it follows that however Nur Bhari got possession it was not as widow of the last owner that she succeeded to the estate in dispute. Mr. Badri Das to succeed must prove that Mt. Nur Bhari succeeded not as an heir of Allah Yar but as representing Hussain Shah her husband. If according to the custom of the tribe she was herself an heir of Allah Yar the fiction of representation on which Mr. Badri Das relied disappears and with it Mt. Sat Bhari's claim as daughter of Hussain Shah."

The test to be applied, according to the above quoted observations, is whether the widow has a customary right to succeed in her own right by virtue of her relationship with the last male holder or she succeeds only as the widow of her own husband. If the former, undoubtedly the succession on her death will be traced to the last male holder; if the latter, the property inherited by her will attach to her husband's estate and the succession thereto will be traced to the husband. The mother having a right to succeed to the son as such the Full Bench judgment in 134 P. R. 1907⁹ is not in conflict with the view taken by the Benches of this Court in the above mentioned cases. The question of the position of the widow of a collateral who under custom succeeds to the estate of the last owner came up for consideration before a Full Bench of this Court in I.L.R. (1944) Lah. 509,¹¹ where the question that arose for decision was whether such a widow could be

8. ('22) 9 A.I.R. 1922 Lah. 217 : 5 Lah. 450 : 74 I. C. 644, Govinda v. Nandu.

9. ('07) 134 P. R. 1907 (F. B.), Hamira v. Ram Singh.

10. ('31) 18 A.I.R. 1931 Lah. 677 : 15 Lah. 563 : 132 I.C. 881, Barkhurdar Shah v. Mt. Sat Bhari.

11. ('44) 31 A.I.R. 1944 Lah. 369 : I.L.R. (1944) Lah. 509 (F.B.), Bahadur Chand v. Mt. Daulat.

regarded as a subsequent holder within the meaning of s. 9, Debtors' Protection Act. My learned brother, who wrote the leading judgment in that case, expressly saved the operation of the above mentioned Division Bench judgments. For the reasons given above, I am of opinion that on the death of Mt. Kaniz Sughra the land inherited by her from the collaterals of her husband Imtiaz Ali is to be treated as a part of the latter's estate and the succession thereto has got to be traced to the said Imtiaz Ali and not to Samsam Ali or Ali Naqi. The right of the plaintiffs as the daughter's sons of Imtiaz Ali to succeed to the latter's ancestral property as against collaterals has not been disputed. The plaintiffs are, therefore, entitled to the decree claimed by them. I would accordingly allow this appeal and, setting aside the decree of the trial Court dismissing the plaintiffs' suit, decree their suit. In view of the circumstances, however, I would leave the parties to bear their own costs throughout.

Mahajan J. — I agree.

G.N. *Appeal allowed.*

[Case No. 4.]

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FULL BENCH

ABDUL RASHID, ABDUR RAHMAN AND KHOSLA JJ.

Chiragh Din and others—Appellants

v.

Ujjagar Singh and others —

Respondents.

First Appeal No. 123 of 1940, Decided on 19th June 1945, from decree of Sub-Judge, 1st Class, Lahore, D/- 15th December 1939.

Custom (Punjab)—Succession—Collateral's widow succeeding under custom — She must be treated as her husband's representative for tracing heir after her death.

When the widow of a collateral is allowed by custom to succeed, she is to be treated as having done so as a representative of her husband and not in her own right as heir to the last male owner, when the next heir after her death has to be traced : (44) 31 A. I. R. 1944 Lah. 369 (F.B.) *Expl.; Case law discussed.* [P 16 C 1; P 20 C 1]

Badri Das, M. L. Puri, D. K. Mahajan and Mathra Das — for Appellants.

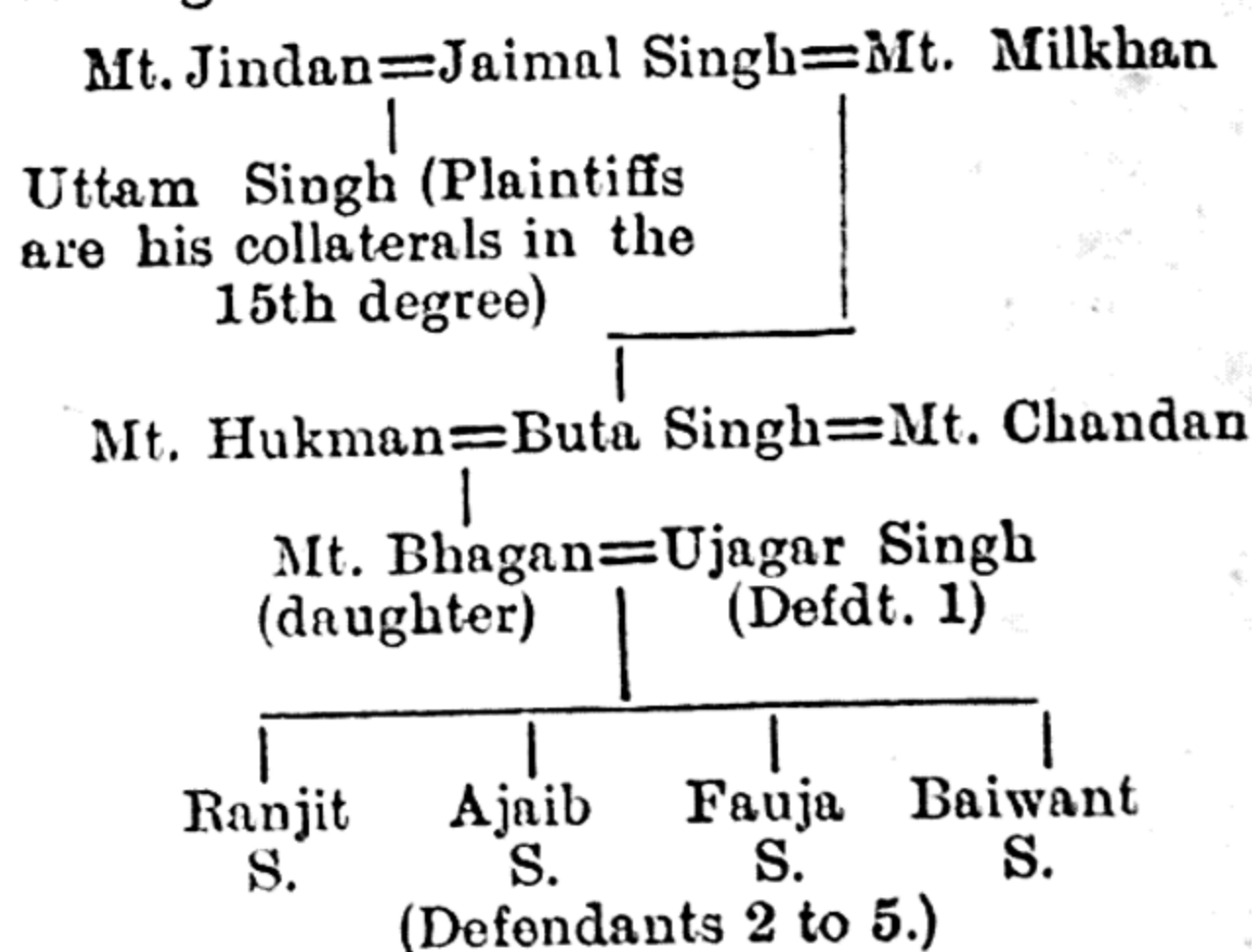
Barkat Ali and D. R. Sawhney —

for Respondents.

Abdul Rashid J. — A Division Bench of this Court has referred the following question to the Full Bench for decision :

“When the widow of a collateral is allowed by custom to succeed, is she to be treated as having done so as a representative of her husband or in her own right as heir to the last male owner, when the next heir after her has to be found ?”

The short pedigree table given below explains the relationship of the parties to this litigation.



Jaimal Singh, who died in the year 1896, was owner of a large landed estate. His property was divided in equal shares between his two sons, Uttam Singh and Buta Singh. Buta Singh died in the year 1909, leaving him surviving two widows and a daughter. His property was mutated in the names of his two widows, namely, Mt. Hukman and Mt. Chandan. Uttam Singh died in the year 1915. He left no near collaterals and his estate was mutated in the name of his mother Mt. Jindan. On the death of Mt. Jindan in the year 1918, the estate of Uttam Singh was also mutated in the names of Mt. Hukman and Mt. Chandan. Mt. Hukman died in the year 1926, and the entire estate of Jaimal Singh was thereafter held by Mt. Chandan till the year 1934. Mt. Chandan died in the year 1934 and the revenue authorities mutated the entire property, which at one time belonged to Jaimal Singh, in the name of Mt. Bhagan, the daughter of Buta Singh. The present suit was instituted by the plaintiffs, who are collaterals of Uttam Singh in the 15th degree on 8rd July 1937, for possession of the estate of Uttam Singh on the ground that Mt. Bhagan could not be treated as the successor of Uttam Singh, as she was the brother's daughter of the last male holder, and as such could not be regarded an heir of Uttam Singh in the presence of his collaterals however remote. The trial Court dismissed the suit and the plaintiffs have preferred an appeal to this Court.

The real question for determination is, whether for purposes of succession to the estate of Uttam Singh, Mt. Chandan is to be regarded as a representative of her husband Buta Singh or whether she is to be regarded as an independent heir of Uttam Singh. In other words, whether on the death of Mt. Chandan, succession has to be traced

to her husband Buta Singh in respect of the estate once held by Uttam Singh, or whether Uttam Singh is to be regarded as the last male holder to whom succession would have to be traced irrespective of the fact that Mt. Chandan held the estate of Uttam Singh for a number of years by virtue of the custom of collateral succession which admittedly prevails among the Jats of the Lahore District. Mr. Badri Das contended that Mt. Bhagan must be regarded as the brother's daughter of Uttam Singh, the last male holder of the property, and as a niece could not be regarded as an heir of Uttam Singh in her own right, the property of Uttam Singh on the death of Mt. Chandan must revert to the plaintiffs who are collaterals of Uttam Singh, the last male holder in the 15th degree. It was contended on the other hand by the learned counsel for the respondents that Mt. Hukman and Mt. Chandan inherited the property of Uttam Singh by virtue of the custom of collateral succession as representatives of their husband Buta Singh and that for the purposes of tracing succession, Buta Singh must be regarded as the last male holder of the property in dispute.

The question involved in the present reference has formed the subject-matter of discussion in five Division Bench judgments of this Court. This point was considered as early as 1916 by a Division Bench consisting of Sir Shadi Lal C. J., and Le Rossignol J. in Civil Appeal No. 1090 of 1912.¹ In that case one Amar Singh died in the year 1904 and was succeeded in the possession of his own estate by his widow Mt. Partapi. Subsequently Atar Singh, a collateral of Amar Singh in the third degree, died and his estate was mutated in the name of Mt. Partapi as a result of collateral succession of a widow. On Mt. Partapi's death a dispute arose regarding the consolidated estate which she has enjoyed between Ramal Devi, her daughter, and Jangi, a collateral of her husband and of Atar Singh. The whole estate was, however, mutated in favour of Mt. Ramal Devi. Pirthu, a collateral of Atar Singh, then instituted a suit claiming the estate on the ground that he was the nearest heir of the last male holder. The case for Mt. Ramal Devi was that the estate of Atar Singh to which Mt. Partapi had succeeded as representative of her deceased husband Amar Singh would follow the same channel of devolution as the estate which

Amar Singh himself possessed in his lifetime. The following observations of the learned Judges may be reproduced in extenso:

"Turning now to the estate of Atar Singh, we find that Mt. Partapi succeeded to his estate collaterally in her capacity of representative of her deceased husband. It is always dangerous to generalize on incidents of Customary law but after due consideration it appears to us that the estate inherited from Atar Singh by Mt. Partapi must be regarded as the estate of her husband Amar Singh. She herself had no independent right to succeed to Atar Singh and her succession to Atar Singh had for basis the rights of her husband Amar Singh. Had Amar Singh been alive at the death of Atar Singh he would of course have succeeded and on his death his consolidated estate would have devolved first upon his widow Mt. Partapi and failing near collaterals on her death upon his daughter Mt. Rupal Devi. By a fiction of custom Mt. Partapi is a representative of her husband and her consolidated estate must therefore be regarded as the estate of her husband Amar Singh."

A similar question arose in A. I. R. 1937 Lah. 468.² In that case one Prem Singh died and his estate was mutated in the name of his widow Mt. Utmi. Thereafter, Mihan Singh and Jowala Singh, brothers of her husband, died and their lands were held by their widows on a life-estate. Mt. Narain Devi, widow of Jowala Singh remarried and Mt. Premi, widow of Mihan Singh, died and the lands held by them passed to Mt. Utmi, widow of Prem Singh as the custom of collateral succession prevailed in that family. Mt. Utmi transferred the lands held by her to her daughter and daughter's sons and mutations were effected in their favour. On the death of Mt. Utmi in 1925, the plaintiffs who were the collaterals of Prem Singh, Jowala Singh and Mihan Singh in the sixth degree, instituted a suit for possession of the lands originally held by the three brothers, on the allegation that Mt. Utmi, who held a life-estate in the lands had no power to make a gift thereof in favour of her daughter and daughter's sons and that they were entitled to succeed to the land on her death. The following observations from this judgment may be reproduced in extenso:

"The main point which requires decision in the circumstances is whether on the death of Mt. Utmi this land should be treated as the property of her husband Prem Singh, or that of his brothers Jowala Singh, and Mihan Singh, who were the actual last male holders of the land, in order to determine the line of succession on her death. The contention of the learned counsel for the appellants was that the land should be treated as an accretion to the estate of Mt. Utmi's husband Prem Singh, as she succeeded to it only as a representative of her husband's estate and not in any independent right of

1. Civil Appeal No. 1090 of 1912, Mt. Ramal Devi v. Pirthi Singh.

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2. (37) 24 A. I. R. 1937 Lah. 468 : 173 I. C. 993, Diwan Singh v. Natha Singh.

her own. There seems to be ample authority to support the contention of the learned counsel that, when a widow succeeds collaterally as in this case she does so as a representative of her husband and in the same way as he would have done if he were alive : *cf.* 43 P. R. 1905,³ 51 P. R. 1909.⁴ In 5 Lah. 192⁵ it was held by their Lordships of the Privy Council that when a widow acquires property by adverse possession in her capacity as such, the property becomes an accretion to her husband's estate and will be treated as his property. I do not see why the same principle should not govern the present case."

Mr. Badri Das contended that the Privy Council judgment in 5 Lah. 192⁵ had no applicability to the facts of the case that was being dealt with by Coldstream and Bhide JJ. in A. I. R. 1937 Lah. 468,² and that they had gone wrong in applying the principles of the Privy Council case to the case that was before them. It was pointed out by the learned counsel that in the Privy Council case the widow purported to hold the estate of which she had taken adverse possession as the widow of her husband. In these circumstances, it could not but be held that the property acquired by the widow by adverse possession would enure for the benefit of the estate of her deceased husband and would descend upon her death to the heirs of her husband. In my opinion, the principle underlying the Privy Council case was applicable to the case that was being dealt with by the learned Judges in A. I. R. 1937 Lah. 468.² This is apparent from the following quotation from the Privy Council judgment :

"It was then argued that the widows could only possess for themselves ; that the last widow Devi would then acquire personal title ; and that the respondents and not the plaintiff were the heirs of Devi. This is quite to misunderstand the nature of the widows' possession. The Hindu widow, as often pointed out, is not a life renter but has a widow's estate—that is to say, a widow's estate in her deceased husband's estate. If possessing as widow she possesses adversely to anyone as to certain parcels, she does not acquire the parcels as stridhan but she makes them good to her husband's estate. The result is the mouzas are Jawahara Mal's estate, the respondents having no title to attack them, and as such the plaintiff is entitled as heir to her father to take them."

Applying the principle underlying the Privy Council judgment, it must be held that Mt. Hukman and Mt. Chandan were holding the estate of Uttam Singh as representatives of their husband and not in their independent right. They were consolidating the

estate of Buta Singh in exactly the same manner as Buta Singh would have done, had Uttam Singh predeceased him. In the present case also Mt. Hukman and Mt. Chandan were purporting to hold the estate of Uttam Singh as the widows of Buta Singh. The next case on the point is A. I. R. 1938 Lah. 111.⁶ In this case the following observations were made by Dalip Singh J. :

"But assuming that this was so, the next question that arises is whether on Mt. Hukam Kaur's death it is the heirs of her husband who have to be traced or the heirs of the last male holder Bur Singh. On this point which is by no means free from difficulty, we have fortunately two authorities to guide us. One is Civil Appeal No. 1090 of 1912¹ where the same point arose for decision, namely, whether in a case where a widow has succeeded collaterally, as it is called, after her death, the heirs of her husband are to be sought or the heirs of the last male holder of the property. It was held in that case that as the widow's right is only a fictitious extension of her husband's right, it is the heirs of the husband who should be sought for on the death of the widow. This civil appeal was followed in A. I. R. 1937 Lah. 468² by a Division Bench of this Court. I see no reason to differ from these rulings and respectfully following them I would hold that on Mt. Hukam Kaur's death it is the heirs of her husband who have to be sought for and not the heirs of Bur Singh as contended by the learned counsel for the appellants."

Skemp J. concurred with Dalip Singh J. and stated that on Mt. Hukam's death, it is the heirs of her husband who have to be sought for and not the heirs of the last male holder. The next case on the point is A. I. R. 1944 Lah. 72.⁷ The leading judgment in this case was delivered by Mahajan J. who made the following observations :

"Another point was raised by Mr. Pandit, and that was that the estate left by Shah Mohammad, could not be regarded as the estate of Din Mohammad, the father of defendants 2 and 3, and the daughters had no right to their uncle's property. It seems to me that this argument has no force in view of the past decisions of this Court to the effect that when a widow succeeds collaterally, the estate that she gets becomes for the purpose of inheritance the estate of her husband, and for all future purposes is treated as the husband's estate."

The learned Chief Justice was in entire agreement with the observations of Mahajan J. Mr. Badri Das relied strongly on the Full Bench judgment of this Court in I. L. R. 1944 Lah. 509,⁸ and contended that when the widow of a collateral is allowed to succeed under the Customary law, she succeeds to the estate of the last male holder in her own customary right and not as a representative

3. ('05) 43 P. R. 1905, Mt. Anar Devi v. Mt. Kanlan.

4. ('09) 51 P. R. 1909 : 2 I. C. 98, Gurdial Singh v. Arur Singh.

5. ('24) 11 A. I. R. 1924 P. C. 121 : 5 Lah. 192 : 51 I. A. 171 : 80 I. C. 788 (P. C.), Mt. Lajwanti v. Safa Chand.

6. ('38) 25 A. I. R. 1938 Lah. 111 : 177 I. C. 420, Mt. Gango v. Mt. Hukam Kaur.

7. ('44) 31 A. I. R. 1944 Lah. 72 : 214 I. C. 34 : I. L. R. (1945) Lah. 110, Qamr-ud-Din v. Mt. Fateh Bano.

8. ('44) 31 A. I. R. 1944 Lah. 369 : I. L. R. (1944) Lah. 509 (F.B.), Bahadur Chand v. Mt. Daulat.

of her husband who is dead. The learned counsel urged that when the widow dies, the succession is to be traced to the last male holder and not to the husband of the widow. It is necessary to examine the facts of the Full Bench case in order to determine whether the observations made in the judgment of the Full Bench are applicable to the present case. One Bahadur Chand obtained a decree for a sum of Rs. 702 against the estate of Sultan Ahmad in the hands of Mt. Daulat Bibi. Sultan Ahmad had three brothers, Haji Ahmad, Gul Ahmad and Yusuf. Mt. Daulat Bibi was the widow of Yusuf. Haji Ahmad died first of all and was succeeded by his other brothers. Yusuf then died and was succeeded by his widow. Gul Ahmad died next and was succeeded by the widows of Yusuf and Sultan Ahmad. Sultan Ahmad died last and was succeeded by the widow of Yusuf. The decree-holder, in execution of his decree, attached the ancestral land left by Sultan Ahmad. An objection was taken to this attachment by Mt. Daulat Bibi on the ground that the land being ancestral in the hands of Sultan Ahmad who was governed by custom, and having come in her hands, she must be regarded as the "subsequent holder" and that the land was, therefore, not liable to attachment and sale under the provisions of S. 9, Debtors' Protection Act. It was pointed out by Mahajan J. that the point that arose for decision was whether a widow in possession of the estate of her husband or a mother succeeding to her son, or a daughter inheriting the property of her father, or a widow inheriting collaterally or any other woman taking a limited estate fell within the meaning of the words "subsequent holder" as used in S. 9, Debtors' Protection Act. He then held that the words "subsequent holder" had acquired a technical meaning and that only male reversioners or collaterals of the last male holder could be included within the term "subsequent holder." The learned Judge relied on 4 P. R. 1913⁹ and held that the words "next holder" had been used by the Full Bench to denote a male reversioner or a collateral of the last male holder and that as a widow was not a male reversioner or a collateral of the last male holder, she could not be included in the term "next holder" or "subsequent holder." The question before the Full Bench had been fully answered by the learned Judge in that portion of the judgment which is printed on pages 509 to

517. After the question had been answered, the learned Judge observed that it had been urged by the learned counsel for the respondent that

"when a widow under custom inherits collaterally she acquires the status of a collateral, and her person is by fiction the person of her deceased husband."

The learned Judge then proceeded to repel this argument. The observations of the learned Judge on pages 518 and 519 were in the nature of obiter dicta. In these circumstances it cannot be said that the Full Bench judgment in I. L. R. 1944 Lah. 509⁸ overruled the four Division Bench judgments referred to above. Moreover, the learned Judge took pains to explain that he was not in any way dissenting from those decisions which laid down that for the purposes of tracing succession when a widow inherits property collaterally, it becomes the property of her husband. This is clear from the following quotation from the Full Bench judgment:

"Further the fiction that when a widow inherits the property collaterally it becomes the property of her husband is only of limited applicability and has been only applied for the purpose of tracing succession to property after the death of the widow."

These observations show that Mahajan J. was not dissenting from the proposition laid down in the four previous Division Bench judgments of this Court so far as the question of tracing succession to the widow was concerned. The observations of the Full Bench, in my opinion, do not in any manner shake the authority of the four Division Bench judgments referred to above. The last Division Bench judgment, dealing with the question which forms the subject-matter of the present reference, was delivered by Achhru Ram and Mahajan JJ. on 8th February 1945 in Regular First Appeal No. 235 of 1941.¹⁰ Achhru Ram J. wrote the leading judgment and agreed with the conclusion arrived at by the four Division Benches to which reference has already been made. The Full Bench judgment in I. L. R. 1944 Lah. 509⁸ was quoted before Achhru Ram and Mahajan JJ. The learned Judges, however, were of the opinion that the Full Bench judgment expressly saved the operation of the previous Division Bench judgments. As Mahajan J. was himself a party to the last judgment, it must be held that he approved of the four Division Bench judgments which have been relied upon in the present case on behalf of the respondents.

9. ('13) 4 P. R. 1913 : 15 I. C. 866, Jagdip Singh v. Narain Singh.

10. Reported in ('46) 33 A. I. R. 1946 Lah. 10, Akhtar Abbas v. Nazar Abbas.

Mr. Badri Das contended strenuously that the result of the Full Bench judgment in I. L. R. 1944 Lah. 509⁸ is that the estate in the hands of the widow who succeeds collaterally is liable for the debts of the last male holder; that is, for purposes of payment of debts the estate in the hands of Mt. Chandan would have to be regarded in the present case as the estate of Uttam Singh, while for the purposes of tracing succession, the estate of Uttam Singh would have to be taken as the estate of Buta Singh, the husband of Mt. Chandan. The learned counsel urged that this was highly illogical. The Court has to determine what was the estate which the widow took when she succeeded collaterally and what are the incidents which attach to such an estate. The estate must be treated on the same footing whether it is a question of payment of debts or whether it is a question of tracing succession. The learned counsel urged that findings on questions of custom can be given either by ascertaining what the custom is or by drawing deductions from an ascertained custom. If deductions are to be drawn from an ascertained custom, the deductions must be logical in their operation. In my opinion, it is universally recognised by the agricultural communities of this Province that whenever a widow acquires property in the family of her husband by means of succession, she acquires it for the benefit of her husband's estate and not on her own behalf. She is carrying on the work of consolidation of the estate which her husband would have carried out had he been alive. The widow cannot form a fresh stock of descent as it is realized that she is merely a representative of her husband so far as property belonging to her husband's family is concerned. In these circumstances, the property in the hands of a widow who succeeds collaterally must be treated as the property of her husband for the purposes of succession on the death of widow. So far as the payment of debts is concerned, the property before reaching the widow had already become liable for the payment of debts of the last male holder. The widow not being a 'subsequent holder,' the estate in her hands is not exempt from the payment of debts incurred by the person whose property has devolved on the widow as a result of the custom of collateral succession. In these circumstances, it cannot be held that the Full Bench decision in I.L.R. 1944 Lah. 509⁸ governs the present case.

Mr. Barkat Ali contended that from 1912

up to 1942 it had been consistently laid down that a widow succeeding collaterally represents her husband and that on her death, succession has to be traced to her husband and not to the last male holder. It was urged that the view taken by several Division Benches of this Court extending over a period of 30 years should not be disturbed because where a decision of the Courts originally wrong or an erroneous conception of the law has been held for a long time and has become the basis on which rights have been regulated and arrangements as to property made, the maxim *communis error facit jus* should be applied. In this connexion reliance was placed on the Full Bench judgment of this Court in 47 P. L. R. 107.¹¹ In my opinion, the doctrine of stare decisis has no applicability in the present case. The judgment in Regular Second Appeal No. 1090 of 1912¹ was not even published in any legal publication. The next judgment of this Court dealing with the point now in dispute was given in the year 1937 when the present suit had already been instituted. For reasons given above, I am in respectful agreement with the five Division Bench judgments dealt with above, and I further hold that the Full Bench judgment in I.L.R. 1944 Lah. 509⁸ does not in any way shake the authority of the five Division Bench judgments dealing with the point involved in the present reference. My answer to the question referred to the Full Bench is that when the widow of a collateral is allowed by custom to succeed she is to be treated as having done so as a representative of her husband when the next heir after her death has to be traced. The record will now be submitted to the Division Bench for the final disposal of the appeal.

Abdur Rahman J. — I agree.

Khosla J. — I agree.

G.N.

Answer accordingly.

11. ('45) 32 A. I. R. 1945 Lah. 123 : 221 I. C. 14: 47 P.L.R. 107 (F.B.), Allah Bakhsh v. Chet Ram.

[Case No. 5.]

A. I. R. (33) 1946 Lahore 20

ABDUR RAHMAN J.

B. Chint Ram

v.

Firm Kirpa Ram Dhani Ram

Second Appeal No. 1205 of 1944, Decided on 30th May 1945.

(a) Punjab Urban Rent Restriction Act (10 [X] of 1941) — Construction — It must be strictly construed.

Statutes, such as the Punjab Urban Rent Restriction Act, which limit the legal rights of subjects have

got to be construed strictly. There is no reason why a liberal or a benevolent construction should be placed on it. [P 22 C 1]

(b) Interpretation of statutes — Retrospective effect when may be given stated.

No statute, unless it be a statute dealing with procedure only, should be construed as having retrospective effect unless the statute expressly made its provisions retrospective or that retrospective effect had to be given to it by necessary implication or intendment: ('43) 30 A.I.R. 1943 Lah. 170 (F.B.), *Foll.* [P 22 C 1]

(c) Punjab Urban Rent Restriction Act (10 [X] of 1941), S. 10—Plaint instituted prior to Act coming into force — S. 10 would not apply.

The words of S. 10 apply to such actions or suits as were brought subsequent to that Act having been brought into force and not to a suit which had been instituted earlier and in regard to which a complete cause of action had accrued to the plaintiff before the institution of the suit. [P 22 C 2]

(d) Practice — Rule of Legislature providing non-execution of certain decrees for certain period — Passing of decree is not prohibited.

The plaintiff's right to have the decree cannot be denied simply because the Legislature had in its wisdom ordered that certain decrees should not be executed for a certain period of time.

[P 22 C 2]

Anant Ram Khosla — for Appellant.

M. L. Puri — for Respondent.

Judgment. — A lease for two shops at Tarn Taran was granted by the plaintiff to the defendant firm for a period of one year. According to the plaintiff the property had to be vacated without notice after the expiry of the term. It was not vacated and the plaintiff served the defendant firm with a notice of ejectment on 31st May 1943 requiring it to vacate the shops by 1st July of that year. As the defendant firm failed to comply, a suit was instituted in the Court of the Subordinate Judge at Tarn Taran on 24th July 1943. The Punjab Urban Rent Restriction Act, 1941, was applied to Tarn Taran on 19th August 1943. The plaintiff then amended his plaint and made allegations which would have entitled him to dispossess the defendant firm even if the Act had been in force before the cause of action had accrued to him. The defendant firm denied the alleged need of the plaintiff and pleaded that it could not also be evicted by virtue of the order promulgated by the Deputy Commissioner, Amritsar, under the Defence of India Act, Ex. D/1. The trial Court held that the shops were not needed by the plaintiff for himself and dismissed the suit. This decision was affirmed by the Senior Subordinate Judge on appeal. This has led the plaintiff to prefer the present appeal.

Learned counsel for the appellant, first of all, contended that the liability to vacate the property had been incurred by the defendant firm before the Punjab Urban Rent Restriction Act had come into force and as the Act was not retrospective in operation, the suit instituted by his client could not be dismissed. In the second place, it was urged that even if S. 10 of the Act were to be so construed as to have retrospective effect it could only prevent a Court from passing an order for the recovery of possession of any premises under certain circumstances but the Court was not precluded from passing a decree and was not in any case required to dismiss a suit for ejectment. Learned counsel for the respondent firm, on the other hand, contends that the word 'order' used in S. 10 is exhaustive and must be read so as to cover a decree to be passed by a Court. He also contends that S. 10 is expressly and, in any case, by necessary implication retrospective and was rightly given effect to by the lower Courts. In the end it was submitted that as no Court was expected to perform an infructuous act, it could not be expected to pass a decree for ejectment when the provisions of the Punjab Urban Rent Restriction Act, which was in force at the time when the decree was passed, rendered it inexecutable. I might say at once that the order promulgated by the Deputy Commissioner has no application to the present case. The plaintiff was asking for nothing, which came into conflict with the order passed by the Deputy Commissioner. As for S. 10, Punjab Urban Rent Restriction Act, it only provides even if found to be retrospective in character that "no order for the recovery of possession of any premises" shall be made so long as certain conditions were not complied with. A decree for possession is obviously different from an order for recovery of possession. The Court passes a decree for ejectment and the Court passes an order for the recovery of possession in execution of that decree if the decree-holder applies for the recovery of possession. Possession is then delivered to the decree-holder by the bailiff in pursuance of that order. The words "order for the recovery of possession" used in S. 10 thus apply to the stage when the plaintiff comes and makes an application for execution of a decree which has been passed in his favour. The term 'decree' has not been used in S. 10 and I cannot assume that, while legislating, the Legislature had omitted to use that well-known

term of art and contented itself by the use of a general word 'order' which is usually used in distinguishing it from a decree. In any case statutes, such as the Punjab Urban Rent Restriction Act happens to be, which limit the legal rights of subjects, have got to be construed strictly and there is no reason why a liberal or a benevolent construction should be placed on it. If a thing is not therefore prohibited by the section, it must be taken to have been authorized and thus construed I must hold that the Court could not have refused to pass a decree on account of the provisions of S. 10, Punjab Urban Rent Restriction Act. I might add that even if I were of opinion that the word 'order' was used by the Legislature so as to cover a decree, all that the Courts could have done was not to pass a decree in favour of the plaintiff until the Act had spent itself either by the expiry of the time mentioned in S. 1 of the Act or otherwise. But there was no justification for dismissing the suit. It should have been kept pending.

Learned counsel for the respondent firm contends that in view of the clear words that "no order for the recovery of possession of any premises shall be made" it was not possible and in any case it would not be open for a Court to evict a tenant even if the word 'order' is not read so as to cover a decree or even if a decree had been passed either before or after the Act had come into force. It was held by the Full Bench to which I was a party in I.L.R. (1943) Lah. 646¹ that according to the well-known construction of statutes no statute, unless it be a statute dealing with procedure only should be construed as having retrospective effect unless the statute expressly made its provisions retrospective or that retrospective effect had to be given to it by necessary implication or intendment. In coming to that decision the learned Chief Justice had relied on the decision of their Lordships of the Privy Council in 1905 A. C. 369.² It is unnecessary to recapitulate the facts of that case here. But Lord Macnaughten's observations quoted at p. 655 of the Lahore Report bring out the point clearly. The decision in (1848) 2 Ex. 22,³ to which a reference was also made at pp. 656-657 in the Full Bench judgment, has very great application in my opinion on

the present case. If the words of S. 18, Gaming Act 8 & 9 Vict. Chap. 109 were, in spite of being as general as they are in S. 10, Punjab Urban Rent Restriction Act, construed as not to have an effect on the contract which had been entered into before the Gaming Act was passed and the operation of the words of the section in that Act was limited by Parke B. to "future contracts and actions on future contracts only at all events to future actions only," there seems to be no reason why I should not construe the words of S. 10, Punjab Urban Rent Restriction Act, similarly and apply them to such actions or suits as were brought subsequent to that Act having been brought into force and not to a suit which had been instituted earlier and in regard to which a complete cause of action had accrued to the plaintiff before the institution of the suit.

The contention that the Court could not pass an infructuous decree was met by the reply that the plaintiff might, even if he was not found entitled to execute it, keep the decree with him and might execute it whenever he was authorized to do so and the fact that he would be unable to execute a decree cannot be taken to mean that the Court in passing such a decree would be doing an infructuous act. There is considerable force in this reply and even if I had not agreed with the learned counsel for the appellant that S. 10, Punjab Urban Rent Restriction Act, did not apply to the present case, I would have had no difficulty in allowing the appeal and passing a decree in favour of the plaintiff although he might not have been able to execute it. The plaintiff's right to have the decree could not be denied simply because the Legislature had in its wisdom ordered that certain decrees should not be executed for a certain period of time. I would, for the above reasons, allow the appeal, set aside the decisions of both the Courts below and pass a decree for ejectment in favour of the plaintiff. There is no reason to deprive the plaintiff of his costs in all the Courts.

R.K.

Appeal allowed.

[Case No. 6.]

A. I. R. (33) 1946 Lahore 22**SPECIAL BENCH****SALE, MAHAJAN AND MARTEN JJ.***Harkishan Singh — Petitioner*

v.

Emperor.

Criminal Application No. 4 of 1944, Decided on 3rd April 1944, for setting aside order, D/- 7th February 1944.

1. ('43) 30 A. I. R. 1943 Lah. 170 : I.L.R. (1943) Lah. 646 : 208 I. C. 345 (F.B.), Peoples Bank of Northern India Ltd. v. Wahid Bux.
2. (1905) 1905 A. C. 369 : 74 L. J. P. C. 77 : 92 L. T. 738, The Colonial Sugar Refining Co. Ltd. v. Irving.
3. (1848) 2 Ex. 22, Moon v. Durden.

(a) Press (Emergency Powers) Act (1931), S. 4 (1) (d) — Section S. 4 (1) (d) deals with offence of sedition as described in S. 124A, Penal Code — Public disorder or reasonable anticipation or likelihood thereof is the gist of offence.

Section 4 (1) (d), Press (Emergency Powers) Act, is substantially in the same terms as S. 124A, Penal Code, and deals with the offence of sedition as described in S. 124A, Penal Code. Sedition has been described as disloyalty in action and the law considers as sedition all those practices which have for their object to excite discontent or disaffection, to create public disturbance or to lead to civil war, to bring into hatred or contempt the Sovereign or Government, the laws or the constitution of the realm and generally all endeavours to promote public disorder. Public disorder or the reasonable anticipation or likelihood of public disorder, is thus the gist of the offence. The acts or words complained of must either incite to disorder or must be such as to satisfy reasonable men that that is their intention or tendency : ('42) 29 A. I. R. 1942 F. C. 22, *Foll.* [P 23 C 2; P 24 C 1]

(b) Press (Emergency Powers) Act (1931), S. 4 (1) (d) — Writing whether seditious within S. 4 (1) (d) — Test — Leaflet headed as "Independence Day Pledge" held did not tend to excite disaffection towards Government and did not fall within S. 4 (1) (d).

In order to determine whether a writing is seditious within the meaning of S. 4 (1) (d) the Court should in every case consider the writing as a whole and in a fair, free and liberal spirit, not dwelling too much upon isolated passages or upon a strong word here and there, which may be qualified by the context but endeavouring to gather the general effect which the whole composition would have on the minds of the public. [P 24 C 1, 2]

A leaflet, which was headed "Independence Day Pledge", in its preamble described the existing conditions in the country, it then proceeded to suggest remedies for bettering these conditions and concluded with an appeal to youngmen to take the pledge with the purpose of uniting them. In its introductory portion, it stated that the Bengal famine was the result of the political deadlock that existed in the country and of national disunity and had resulted in five million deaths in Bengal. The leaflet then went on to say: "The alien imperialists, clinging desperately to the policy of deadlock, keep them (the political leaders) behind the bars as their only chance to prevent our march to freedom and power." In the portion of the leaflet in which an appeal was made to youngmen to take the vow appeared the words: "In the name of the five million murdered in Bengal." Objection was taken that these words tended to excite disaffection towards Government established by law in British India as they involved the suggestion that five million people had been murdered in Bengal by the monster famine born out of the deadlock created by the policy of the Government who were intentionally sticking to this policy in order to prevent the march of freedom :

Held that, (1) expressions such as "the alien imperialists, clinging desperately to the policy of deadlock, keep them (the political leaders) behind the bars as their only chance to prevent our march to freedom and power" were the usual stock-in-trade of political demagogues and had no tendency

to excite disaffection against the Government. There was no sting left in them and they were of every day use and might be styled as political exaggerations; [P 25 C 1]

(2) the criticism that certain policy of the Government was so unfortunate that it had created a political deadlock which had led to famine conditions resulting in a large number of deaths of people by hunger, could not be construed as meaning that the Government that pursued that policy was guilty of murder of the people who died owing to famine conditions in the country. Therefore the words "in the name of the five million murdered in Bengal" though they involved strong criticism of the Government's policy of deadlock could not be regarded as exciting disaffection towards the Government; [P 25 C 1, 2]

(3) the leaflet read as a whole did not come within the mischief of S. 4 (1) (d) : ('42) 29 A.I.R. 1942 F. C. 22, *Foll.* [P 26 C 1]

S. Gopal Singh — for Petitioner.

M. Sleem, Advocate-General — for the Crown.

Mahajan J. — This is an application under S. 23, Press (Emergency Powers) Act, 23 [XXIII] of 1931, by one Harkishan Singh, keeper of the Asha Art Press at Lahore, for the setting aside of the order of forfeiture of his security passed by the Governor of the Punjab. The order was passed on the basis of a leaflet which was published by the keeper of the said Press about 24th January 1944 headed as "Independence Day Pledge". This leaflet, in the opinion of the Governor of the Punjab, contained words which were of the nature described in cl. (d) of sub-s. (1) of S. 4 of the aforesaid Act. The order of forfeiture was passed on 7th February 1944 in exercise of the powers conferred by S. 4 (1) (i) of this Act, and declares that the security of Rs. 500 shall be forfeited to His Majesty. The material portion of S. 4 (1) (d) is as follows :

"Whenever it appears to the Provincial Government that any printing press in respect of which any security has been ordered to be deposited under S. 3 is used for the purpose of printing or publishing any newspaper, book or other document containing any words, signs or visible representations which tend, directly or indirectly, to bring into hatred or contempt His Majesty or the Government established by law in British India or the administration of justice in British India or any class or section of His Majesty's subjects in British India, or to excite disaffection towards His Majesty or the said Government, the Provincial Government may, by notice in writing to the keeper of such printing press, stating or describing the words, signs or visible representations which in its opinion are of the nature described above, where security has been deposited, declare such security, or any portion thereof, to be forfeited to His Majesty."

This clause is substantially in the same terms, as S. 124A, Penal Code, and cl. 6 (e) of R. 34, Defence of India Rules and deals with the offence of sedition as described in the

Code. In A. I. R. 1942 F. C. 22,¹ it has been held that

"sedition embraces all those practices, whether by word, deed or writing, which are calculated to disturb the tranquillity of the State and lead ignorant persons to subvert the Government. The objects of sedition generally are to induce discontent and insurrection, to stir up opposition to the Government and to bring the administration of justice into contempt; and the very tendency of sedition is to incite the people to insurrection and rebellion. Sedition has been described as disloyalty in action and the law considers as sedition all those practices which have for their object to excite discontent or disaffection, to create public disturbance or to lead to civil war, to bring into hatred or contempt the Sovereign or Government, the laws or the constitution of the realm and generally all endeavours to promote public disorder."

It was further held in this case that

"sedition is not an offence in order to minister to the wounded vanity of the Government, but because where Government and the law cease to be obeyed because no respect is felt any longer for them only anarchy can follow. Public disorder or the reasonable anticipation or likelihood of public disorder, is thus the gist of the offence. The acts or words complained of must either incite to disorder or must be such as to satisfy reasonable men that that is their intention or tendency."

The question for consideration in the present case is whether in view of the broad principles underlying the conception of sedition can it be said that the leaflet objected to and headed as 'Independence Day Pledge' falls within cl. (d) of sub-s. (1) of S. 4, Press (Emergency Powers) Act, 23 [XXIII] of 1931. Under the provisions of S. 23 of the Act, the High Court has to decide whether the leaflet, in respect of which the order was made, did or did not contain any words, signs or visible representations of the nature described in the above section; in other words, whether the leaflet read as a whole could be said to be a seditious one. The learned Advocate-General, who argued the case on behalf of the Government, urged that the leaflet in question was one which tended, directly or indirectly, to excite disaffection towards the Government established by law in British India.

In my view if the leaflet is considered as a whole, the effect of the language used in it does not tend, directly or indirectly, to excite disaffection towards the Government established by law in British India. It is a well-recognised principle that the Court should in every case consider the writing as a whole and in a fair, free and liberal spirit, not dwelling too much upon isolated passages or upon a strong word here and there, which

may be qualified by the context but endeavouring to gather the general effect which the whole composition would have on the minds of the public. The object of the leaflet in question, which purports to have been issued by the D. A. V. College Students' Union, was to persuade youngmen to take the so-called independence day pledge with the purpose of uniting the Indian people in order to win back Mahatma Gandhi and Congress Leaders from jail, so that they may be able to resolve the deadlock and forward the cause of freedom. A vow had to be taken to unite the great organisations of the country, that is, the Congress, the League and the Mahasabha, together, so that they may save the nation and win its liberation. The leaflet in its preamble described the existing conditions in the country, it then proceeded to suggest remedies for bettering these conditions and concluded with an appeal to youngmen to take the pledge for the objects above mentioned. In its introductory portion, it stated as follows :

"We believe that it is the inalienable right of the Indian people, as of any other people to have freedom and to enjoy the fruits of their toil. To-day, the Indian people are not only denied freedom but are faced with the prospect of being utterly and completely wiped out of existence. The monster famine, born out of deadlock and national disunity, has already slain five million of our countrymen in Bengal. Every day its tentacles spread further into every province of our land, tearing up its very social framework. Encouraged by the onward march of famine, the Japs on our borders, driven desperate in China and Pacific, fling their bombs on our cities and villages, taking their toll of Indian blood. At such a moment in our history a moment in which hangs the fate of our whole people, our national Leaders, they who alone could save millions of lives, are in prison."

It was not contended by the learned Advocate-General that the language of the leaflet so far came within cl. (d) of S. 4 (1) of the Act. It no doubt stated that famine was the result of the political deadlock that existed in the country and of national disunity and had resulted in five million deaths in Bengal. But it did not say that the alien Government had deliberately brought about famine conditions in the country. The leaflet then went on to say :

"The alien imperialists, clinging desperately to the policy of deadlock, keep them behind the bars as their only chance to prevent our march to freedom and power."

In other words, it blames the ruling power for not attempting to resolve the deadlock and the reason assigned for their apathy in this matter is that they do not like to do so as in their view the policy of deadlock would prevent the march of India to freedom.

1. ('42) 29 A. I. R. 1942 F. C. 22 : I. L. R. (1942) Kar. F. C. 56 : 200 I. C. 289 (F. C.), Niharendu Dutt v. Emperor.

Expressions such as these are the usual stock-in-trade of political demagogues and have no tendency to excite disaffection against the Government established by law in British India. They do not excite anybody. There is no sting left in them and they are of every day use and may be styled as political exaggerations. The leaflet then went on to state that there was no future for the Indian people unless the policy of deadlock was defeated and unless the beloved leaders were released to save Bengal and unite the people for the fight for independence. No exception was taken to this portion of the leaflet. The leaflet then stated the following :

"We believe that we can win back our leaders and smash the deadlock, if we unite all patriotic parties in our land against famine to save Bengal. We believe that out of this united effort will come a mighty united movement of the people, a growing unity between the Congress, the League, the Mahasabha and other political parties, in which the question of self-determination will be settled and our leaders released, as the political parties march hand in hand to end the deadlock and build a National Government."

No suggestion was made that there was anything in the language here to which any exception could be taken. Then comes the portion of the leaflet in which an appeal has been made to youngmen to take the vow. This appeal is in the following words :

"In the name of the martyrs who have fallen in the sacred cause of Independence.

In the name of the five million murdered in Bengal.

In the name of the lakhs of men and women and children who live to-day in the anguish of hunger and disease in Bengal and Andhra and Gujerat and Tamilnad and Bihar and Orissa and Malabar."

In this appeal the words "in the name of five million murdered in Bengal" were relied upon by the learned Advocate-General in support of his argument that the use of such language tended to excite disaffection against the Government established by law in British India. The learned Advocate-General contended that the suggestion here was that five million people had been murdered in Bengal by the monster famine, born out of the deadlock created by the policy of the alien imperialists who were intentionally sticking to this policy in order to prevent the march of freedom and, therefore, there was in this language involved an accusation against the Government that they were the murderers of five million of people in Bengal. In my view, this contention of the learned Advocate-General is without force. In the first place, reasonably construed the language does not mean or convey the effect which

was contended for on behalf of the Crown. The murders in Bengal were the acts of monster famine and not the acts of the alien imperialists. No doubt it was stated that the famine had been caused by the policy of deadlock pursued by the alien imperialists but it was also stated that it was partially due to that policy and partially it was the result of national disunity. The criticism that certain policy of the Government is so unfortunate that it has created a political deadlock which has led to famine conditions resulting in a large number of deaths of people by hunger, cannot be construed as meaning that the Government that pursued that policy was guilty of murder of the people who died owing to famine conditions in the country. It is only by straining the language and by stressing this isolated passage that some remote inference could be drawn from these words that they might have the tendency of exciting disaffection against the Government but these words certainly cannot be said to have the tendency to excite disorder and hence seditious. In my view, the leaflet in this part only strongly criticises the policy of deadlock followed by the Government, but it does not tend to excite disaffection towards it. The leaflet then concluded with the following pledge :

"We vow that their anguish shall not be in vain.

We vow that out of their anguish we shall build the firm unity of our people.

We vow that we shall strive to forge unity to save Bengal.

We vow that we shall strive to fight the famine that is spreading all over the land.

We vow that we shall strive to win back Mahatma Gandhi and our beloved Congress leaders from within the jail walls, so that they may lead us out of this deadlock and forward to freedom.

We vow that we shall strive to unite the great organisations of our people, the Congress and the League and the Mahasabha, so that together they may save our nation and win its liberation."

It was not suggested that this part of the leaflet had any tendency to excite disaffection against the Government established by law in British India. Therefore, if the leaflet were considered as a whole in a fair, free and liberal spirit and too much emphasis was not laid on one or two isolated passages or on any strong word here and there, the general effect of the whole composition on the minds of the public, in my view, was not one which could bring it within the purview of cl. (d) of sub-s. (1) of S. 4, Indian Press (Emergency Powers) Act. The whole object of the leaflet was to persuade youngmen to take the Independence Day Pledge, so that they may work for

the unity of the motherland, which could be achieved only if all the leading political organisations of the country united and a National Government was formed, and the Government was persuaded to abandon its policy of deadlock. In A.I.R. 1942 F. C. 22,¹ above cited, the learned Chief Justice of the Federal Court observed as follows:

"There is an English saying that hard words break no bones; and the wisdom of the common law has long refused to regard as actionable any words which, though strictly and literally defamatory, would be regarded by all reasonable men as no more than mere vulgar abuse. Abusive language, even when used about a Government, is not necessarily seditious, and there are certain words and phrases which have so long become the stock-in-trade of the demagogue as almost to have lost all real meaning."

In my view, though certain words used in the leaflet are such to which exception may be taken but these are words which are repeated everyday by critics of the Government. Every reasonable reader of such language has a tendency to place a discount on it, because he has read it so often and *ad nauseam*. The use of such words creates no effect on the mind of any reasonable reader and therefore it does not tend to excite disaffection against the Government and, hence such a writing is outside the ambit of cl. (d) of sub-s. (1) of S. 4 of the Act. In my judgment, the leaflet read as a whole is not a document in respect of which an order of forfeiture could be made under S. 4 of the Act, as it did not contain any words, signs or visible representations of the nature described in that section. I would, therefore, accept this petition and set aside the order of forfeiture. The petitioner is allowed his costs which are assessed at Rs. 50.

Sale J.—Following A.I.R. 1942 F. C. 22,¹ I agree.

Marten J.—I agree that, in view of the Federal Court ruling, this petition must be accepted.

G.N./V.S.

Petition accepted.

[Case No. 7.]

A. I. R. (33) 1946 Lahore 26

FULL BENCH

**HARRIES C. J., DIN MOHAMMAD
AND SALE JJ.**

Emperor

v.

Mohd. Yusaf and others—Respondents.

Criminal Appeal No. 959 of 1943, Decided on 14th February 1944.

Public Gambling Act (1867, as amended by Punjab Act 1 [I] of 1929), Ss. 5 and 6—Search

warrant issued by authority specified in S. 5 on face of it regular — Presumption under S. 114 Illustration (e), Evidence Act, that authority acted on credible information can be drawn so as to attract S. 6 — Presumption is rebuttable — Mere production of warrant if sufficient to prove credibility of information — Evidence of Police Sub-Inspector as to credibility of information if sufficient

Provided the warrant issued under S. 5, is on the face of it regular, the presumption under S. 114 Illustration (e), Evidence Act, does arise, and the Court may presume that the officer issuing the warrant has acted on credible information and the presumption arising under S. 6 would arise if as a result of the ensuing search, the articles indicated in S. 6 are found. But the Court is not bound to raise the presumption under S. 114 Illustration (e), Evidence Act. The presumption is rebuttable and it is open to the Court in proper cases even when the warrant is in proper form to refuse to raise the presumption on good cause being shown. It is open to the Magistrate to hold, after hearing all the evidence, including such evidence as the accused may wish to lead that the mere issue or service of warrant in a particular case is not sufficient to give rise to the presumption that the house searched is a common gaming house merely because cards and other such instruments of gaming happen to be found therein. If it is shown that upon the whole information before the officer issuing the warrant, there was no reason to believe that the premises searched were used as a common gaming house, for the profit or gain of some person connected with them, as owner or otherwise, it would be difficult to uphold the validity of the warrant, as laying down foundation for the presumptions mentioned in S. 6: 7 P.R. 1882 Cr. (F.B.) and ('43) 30 A.I.R. 1943 F.C. 75, *Rel. on; Case law discussed.*

[P 29 C 2; P 30 C 1, 2]

If the Court chooses to draw a presumption under S. 114 Illustration (e), Evidence Act, regarding the credibility of the information on the basis of which the warrant under S. 5 was issued the mere production of a warrant might be sufficient to prove the credibility of the information and it is not incumbent upon the prosecution to place before the Court the nature of the information received. But if the prosecution depends in any particular case on the mere production of the warrant, it would do so at its own risk, because the Court may refuse to draw the presumption, in which case the probability is that the prosecution case would fail.

[P 30 C 2]

If the prosecution does not choose to depend on the mere production of the warrant to prove the credibility of the information on the basis of which the warrant was issued the best evidence to prove the credibility of the information would be that of the officer to whom the alleged credible information had been given. In most cases the officer concerned would be the Sub-Inspector of Police and his evidence would be sufficient to meet the requirements of the law.

[P 30 C 2; P 31 C 1]

R. C. Soni — for the Crown.

N. C. Pandit — for Respondents.

Sale J. — Three questions have been referred to a Full Bench in the following terms:

(1) Whether the mere issue of a warrant by the authority specified in S. 5, Public Gambling Act, is sufficient to prove for the purpose of S. 6 that the place searched under the authority of the warrant issued is a common gaming house and that

the persons found therein were there present for the purpose of gaming?

(2) Whether the mere production of a warrant issued under S. 5 stating that it was being issued on credible information and after such inquiry as the officer concerned has considered necessary is sufficient to prove the credibility of the information on the basis of which the warrant purports to have been issued or whether it is incumbent upon the prosecution to place before the Court the nature of the information received so as to enable the Court to determine its credibility or otherwise?

(3) Whether the evidence of the Sub-Inspector of Police to the effect that he had received credible information which was placed before the authority specified in S. 5 before the warrant was issued is sufficient to meet the requirements of law?

The relevant facts giving rise to this reference have been recited in the order of reference and need not be recapitulated. It will be convenient first to analyse the relevant sections of the Public Gambling Act, III [3] of 1867, which have to be considered for the decision of the three points referred. Gambling or gaming is only an offence if carried on in a "common gaming house" which as defined in S. 1 is a place where instruments of gaming are kept or used for the profit or gain of the owner or occupier of the house. Section 5 empowers certain Magistrates or the District Superintendent of Police "upon credible information and after such inquiry as he may think necessary" either himself to enter, or by his warrant to authorize a subordinate police-officer to enter the house in question for the purpose of search and seizure of such instruments of gaming as may be found therein. Section 6 provides that if in any house entered or searched under the provisions of S. 5, cards, dice or other instruments of gaming are found

"It shall be evidence, until the contrary is made to appear, that such house is used as a common gaming house and that all persons found therein were there present for the purpose of gaming."

Section 6 thus provides that such articles as cards, dice etc., which are innocent in themselves, shall if found in a house, searched under the provisions of S. 5, afford presumptive proof that the house is a common gaming house, that is that it is run for the profit or gain of the occupier. Now it is not the object of the Act to penalize the mere playing of a game involving chance, in a private house; nevertheless the private house-holder who indulges in a quiet game of bridge in his house with three friends may find, if the officers empowered under S. 5 choose to issue a search warrant, that he is presumed to be running a common gaming house and that his guests are engaged in illegal gaming. It follows, therefore, that

the issue of a search warrant and the discovery of cards in a house in consequence may result in the house-holder and his guests being presumed guilty until they can prove their innocence, the exact reversal of the ordinary rule of criminal law under which every man is innocent unless he is proved guilty.

No doubt the Legislature has by enacting Ss. 5 and 6, Public Gambling Act, deliberately intended to simplify what might otherwise be a difficult matter viz., proof that a certain house is a common gaming house run for the profit or gain of the occupier. On the other hand, this simplification if abused may lead to serious injustice. It may not be easy in such cases for an occupier to establish his innocence and the question, therefore, arises of safeguards against possible abuse of power by the authorities in question. In the light of these considerations I now turn to consider the questions referred to us. The first two questions, being concerned with the nature and proof of the credibility of the information on which the warrant, contemplated by S. 5 is to be issued, are closely connected and may be discussed together.

The law on the point as generally understood in this Province is contained in 7 Lah. 310¹ in which Broadway J. held that where a Superintendent of Police issues a warrant and signs it, certifying that he "had reason to believe, etc.," the only interpretation to be placed on the warrant is that the Superintendent of Police had reason to believe and that, therefore, he acted upon "credible information" within the meaning of S. 5, Gambling Act. The learned Judge went on to hold that since the search in that case was undoubtedly made under S. 5, the presumption arising out of the discovery of the articles, i. e., cards, clearly arose as provided in S. 6 of the Act. Broadway J. pointed out in this ruling that 9 P. R. 1876 Cr.² in which it had been held by a majority that a mere report or information by a police-officer is not credible information justifying the issue of a search warrant is no longer good law having been distinguished and disapproved in certain later authorities, in particular, (1) a Division Bench judgment of the Chief Court, 29 P. R. 1881 Cr.³ and (2) a Full Bench judgment of the Chief Court, 7 P. R. 1882 Cr.⁴ In both cases the judgments

1. ('26) 13 A. I. R. 1926 Lah. 459 : 7 Lah. 310 : 96 I. C. 654, Ahmad Hassan v. Emperor.

2. ('76) 9 P. R. 1876 Cr., Sandhi v. Emperor.

3. ('81) 29 P. R. 1881 Cr., Empress v. Mazhar Ali.

4. ('82) 7 P. R. 1882 Cr. (F.B.), Kada v. Empress.

were delivered by Sir Meredyth Plowden. In 29 P. R. 1881 Cr.³ the learned Judge after stating that the entry of the house which led to the arrest of the accused and their ultimate conviction, was made under the authority of a warrant under S. 5, which upon the face of it was regular and valid, observed as follows :

"It purports to be issued upon credible information and after enquiry This being so, it was open to the Magistrate to presume, until the contrary was made to appear, that the warrant had been issued upon credible information and after sufficient enquiry; and nothing was given in evidence by the accused in rebuttal of this presumption."

In other words, the learned Judge held that the Magistrate could presume that a warrant which upon the face of it was regular and valid had been issued upon credible information. In the Full Bench judgment 7 P. R. 1882 Cr.⁴ Sir Meredyth Plowden observed that the term "credible information" in S. 5, includes any information which in the judgment of the officer to whom it is given appears entitled to credit in the particular instance, and which he believes. The learned Judge was not directly concerned with the question of the presumption which he had held to apply in the earlier judgment, but he made some important observations regarding the security which S. 5 provides against the improper invasion of private premises. These observations will have to be considered at a later stage. Suffice it to say that Sir Meredyth Plowden was again of the opinion that the warrant under S. 5 itself if valid on the face of it was sufficient to show that the information was credible in the judgment of the officer to whom it was given.

Now the presumption that a warrant under S. 5 has been issued upon credible information and after sufficient enquiry would arise, if at all, under S. 114, Evidence Act, illust. (e), which provides that the Court may presume that judicial and official acts have been regularly performed. The first question for decision is whether any such presumption as is contemplated by this section is applicable to the contents of a warrant issued under S. 5, Gambling Act, and if so, to what extent. Mr. Soni urges on behalf of the Crown that provided the warrant is on the face of it in order, the presumption applies and the Court should in ordinary cases draw this presumption so as to attract the provisions of S. 6. He concedes, however, that if the warrant is not in proper form no such presumption will arise and the Magistrate should require proof of the credibility of the

information. On the other hand, Mr. Pandit on behalf of the respondents urges that the presumption is concerned with procedure only and would apply merely to the signature on, and service of, the warrant, but not to its contents. He contended that the accused is always entitled to challenge the credibility of the information on which the warrant is based and to put the prosecution to proof thereof. For this contention Mr. Pandit relied chiefly on 52 Cal. 319,⁵ which was a decision on an application under S. 491, Criminal P. C., arising out of an arrest under S. 54, seventhly, of the same Code. It was pointed out by the learned Judges that in such a case the police-officer has to exercise his own independent judgment and that what is a "reasonable complaint or credible information" depends on the circumstances of each case; but it must be founded on some definite fact, some tangible proof establishing in his mind the reasonableness or credibility of the charge and not on a mere surmise.

Now the applicability of the presumption under S. 114 (e), Evidence Act, was not considered in this judgment but in any case a decision based on the wording of S. 54, Criminal P. C., is not in point. The section itself contemplates nine different grounds on which a police-officer may arrest without a warrant and it can hardly be said that the presumption under S. 114 (e) would apply *ipso facto* to any of the grounds, which would have to be independently alleged and established. Mr. Pandit also relied on two Single Bench rulings of the Allahabad High Court, A.I.R. 1936 ALL. 109⁶ and 45 ALL. 258.⁷ In the latter case Ryves J. had observed that to draw the presumption arising from the mere issue of a warrant under S. 5 would be "stretching the point unduly against the accused." These cases, however, must be deemed to have been decided on their own facts, and it is doubtful whether the attention of the learned Judges was directed to the nature of the presumption envisaged by S. 114 (e), Evidence Act.

The real basis of Mr. Pandit's argument is contained in 53 Cal. 718⁸ a Division Bench judgment decided in 1926 which followed an earlier decision of the Calcutta High Court

5. ('25) 12 A.I.R. 1925 Cal. 278 : 52 Cal. 319 : 85 I. C. 913, Sobodh Chundra v. Emperor.

6. ('36) 23 A. I. R. 1936 All. 109 : 160 I. C. 998, Thakur Das v. Emperor.

7. ('23) 10 A.I.R. 1923 All. 192 : 45 All. 258 : 76 I. C. 969, Emperor v. Durga Prasad.

8. ('26) 13 A.I.R. 1926 Cal. 966 : 53 Cal. 718 : 96 I. C. 264, Walvekar v. Emperor.

cited as 13 Cal. 197.⁹ It was therein laid down that S. 114, illust. (e), does not dispense with the necessity of proof of the preliminary conditions justifying the issue of a warrant. Where certain things are required to be done by a statute before any liability attaches in respect of any right or obligation, it is for him who alleged that it has been incurred to prove that the prescribed things have been actually done, and no presumption arises as to their having been done.

This case was concerned with the issue of a warrant under S. 46, Calcutta Police Act, which is analogous to S. 5, Gambling Act. It is immaterial for the purposes of the argument that in S. 46, Bengal Act, the information has to be laid before a Commissioner of Police or a Magistrate on oath. For the rest S. 46, like S. 5, Public Gambling Act, requires that the authority issuing a warrant should have "reason to believe that the house to be searched is used as a common gaming house." Now in the Calcutta case the warrant was admittedly open to the objection that it was invalid as having been issued on the existence of a mere "cause for suspicion" which the learned Judges pointed out is a very different thing from "reason to believe." Accordingly in the Calcutta case the warrant was on the face of it irregular and therefore the presumption under S. 114 could not in any event apply.

Apart however from this ground for distinction, it is doubtful whether this authority lays down good law in view of a subsequent decision of the Privy Council in 57 I.A. 214¹⁰ wherein their Lordships applied the presumption arising under S. 114, Evidence Act, in a case governed by ss. 12 and 13, Bengal Tenancy Act. A Division Bench of the Calcutta High Court in 1931 cited as 35 C. W. N. 1239¹¹ referred to this Privy Council decision and pointed out that the correctness of such decisions as 13 Cal. 197⁹ regarding the inapplicability of a presumption to the issue and service of warrants and notices must, in consequence of this ruling, be regarded as open to doubt. 53 Cal. 718⁸ is not specifically cited in 35 C. W. N. 1239¹¹ but is obviously covered by the same criticism.

The matter is, in my view, concluded by a recent decision of the Federal Court: A.I.R.

9. ('86) 13 Cal. 197, Ashan-ullah Khan v. Trilochan Bagchi.

10. ('30) 17 A. I. R. 1930 P.C. 193 : 58 Cal. 301 : 57 I. A. 214 : 126 I. C. 422 (P.C.), Jitendra Nath v. Manmohan Ghose.

11. ('32) 19 A. I. R. 1932 Cal. 267 : 59 Cal. 255 : 137 I. C. 147 : 35 C. W. N. 1239, Sasi Sekhar Biswas v. Bir Bikram Kishore Manikya.

1943 F. C. 75¹² which related to the validity of certain detention orders passed under R. 26, Defence of India Rules. This rule requires that before making an order of detention the Governor should be satisfied on several preliminary matters and the learned Judges held that the presumption set out in illust. (e) to S. 114, Evidence Act, would apply to establish the satisfaction of the Governor, if it can be shown that the orders are on the face of them regular and conform to the provisions of the rule under which they purport to have been made.

If, therefore, the presumption under section 114 (e) applies to detention orders under R. 26, Defence of India Rules, in which the difficulty of the detenus in rebutting the presumption is obvious, the presumption must apply *a fortiori* to the case of a warrant issued under S. 5, which is a preliminary to a regular trial wherein the accused would have an opportunity to rebut the presumption. In my opinion, therefore, the answer to the first question referred is that provided the warrant issued under S. 5, Gambling Act, is on the face of it regular, the presumption under S. 114, illust. (e), Evidence Act, does arise, and the Court *may* presume that the officer issuing the warrant has acted on credible information. And it would follow that the presumption arising under S. 6 would arise if as a result of the ensuing search, the articles indicated in S. 6 are found. It is necessary, however, to make it clear that the Court is not bound to raise the presumption under S. 114(e), Evidence Act, and that in proper cases it is open to the Court to refuse to raise any such presumption. In this connexion reference should be made to the safeguards referred to by Sir Meredyth Plowden in the Full Bench judgment 7 P. R. 1882 Cr.⁴ in dealing with a warrant issued under S. 5, Gambling Act :

"The security which the section provides against the invasion of private premises lies in this, that the Magistrate is required to have reasonable ground to believe that the premises to be searched are used as a common gaming house within the definition given in S. 1 of Act 3 [III] of 1867. In other words, no information should be deemed sufficient for the issue of a warrant under S. 5, unless the reasonable inference from the information given or elicited by further enquiry is, not merely that gaming is practised on the premises indicated, but that it is so practised for the profit or gain of some person connected with them, the circumstance that such profit or gain is the purpose for which instruments of gain (*sic*. gaming ?) are kept or used therein being the test, whether

12. ('43) 39 A. I. R. 1943 F. C. 75 : I.L.R. (1943) Kar. F. C. 103 : 1944 F. C. R. 1 : 211 I. C. 241 (F.C.), Emperor v. Sibnath Banerji.

private premises are liable to search by warrant. This, therefore, is the point to which officers preparing to act under S. 5 of the Act are bound to direct their special attention, and on which they are bound to satisfy themselves before they issue a warrant authorizing an entry upon private property. Want of care in this respect is likely to conduce to oppression, especially at seasons such as the Dewali, when it is known that gaming takes place, among Hindus especially, an act which is not a criminal violation of the law, unless it be conducted in such a manner that the premises fall within the legal definition of a common gaming house. The point mentioned is one of paramount importance, for if it should be made to appear in the subsequent proceedings that upon the whole information before the officer issuing the warrant, there was no reason to believe that the premises searched were used as a common gaming house, for the profit or gain of some person connected with them, as owner or otherwise, it would be difficult to uphold the validity of the warrant, as laying down foundation for the presumptions mentioned in S. 6 of the Act."

I would respectfully endorse the observations in the above quotation from Sir Meredyth Plowden's judgment and take this opportunity to reproduce and reiterate them for the guidance of all concerned. The question arises, however, as to how these safeguards are to be enforced by the Courts trying cases under the Gambling Act. It is not sufficient in my view to hold, as was done in A.I.R. 1937 Nag. 396,¹³ that the mere fact that a Magistrate signs a warrant is sufficient guarantee that he was acting on credible information, or to place implicit trust on the discretion of the police officer issuing a warrant as was apparently done in 22 P. R. 1895 Cr.¹⁴ and 17 P. R. 1897 Cr.¹⁵ Cases such as 28 ALL. 210¹⁶ or A. I. R. 1929 Lah. 710¹⁷ are not in point as in those cases all the evidence was placed before the Court and no question of a decision based on a presumption from the mere issue of a warrant under S. 5, arose.

The answer seems to be that the safeguards envisaged in the citation from Sir Meredyth Plowden's judgment can be secured by the trying Magistrate refusing to draw the presumption under S. 114 (e), Evidence Act, even when the warrant is in proper form, on good cause being shown. As has already been pointed out this presumption is rebuttable, and it is open to the Magistrate to hold, after hearing all the evidence, including such evidence as the accused may wish to lead, that the mere

issue and service of a warrant in a particular case is not sufficient to give rise to the presumption that the house searched is a common gaming house merely because cards and other such instruments of gaming happen to be found therein. No doubt, if there is no evidence in rebuttal and the warrant is on the face of it in order, the Court might be justified in drawing the presumption that the warrant was issued on credible information; but it is always open to the accused to suggest that the credible information in any particular case is the false information of an informer actuated by spite, and that in fact the house was not being used for the profit or gain of the owner. If the prosecution choose to depend on the mere production of the warrant as giving rise to the presumption that the officer issuing the warrant acted on credible information, it is always open to the Court, after hearing the evidence, to decline to draw this presumption and therefore to hold it not proved that the information on which the warrant is based was credible. In such a case in the absence of any proof of the credibility of the information, it would follow that the presumption embodied in S. 6 would not arise from the mere issue and service of a search warrant under S. 5, and in the absence of any positive evidence to prove that the house searched was a common gaming house the prosecution would fail. The answer then to the second question referred in my opinion is that if the Court chooses to draw a presumption under S. 114 (e) regarding the credibility of the information the mere production of a warrant might be sufficient to prove the credibility of the information and that it is not incumbent upon the prosecution to place before the Court the nature of the information received. But the discussion has made it clear that if the prosecution depends in any particular case on the mere production of the warrant, it do would so at its own risk, because the Court may refuse to draw the presumption, in which case the probability is that the prosecution case would fail.

Turning now to the third question referred it has been made clear that while the prosecution may depend on the mere production of a warrant to prove the credibility of the information, it would do so at its own risk, and the question then arises that if the prosecution does not choose to depend on the mere production of the warrant, what is the evidence that they should lead to prove the credibility of the information? In my

13. ('37) 24 A. I. R. 1937 Nag. 396 : I.L.R. (1939) Nag. 380 : 172 I. C. 182, Rahman Khan Afzal Khan v. Emperor.

14. ('95) 22 P. R. 1895 Cr, Vir Singh v. Empress.

15. ('97) 17 P.R. 1897 Cr, Basanta Mal v. Empress.

16. ('06) 28 All. 210, Emperor v. Abdus Samad.

17. ('29) 16 A.I.R. 1929 Lah. 710 : 119 I. C. 429, Sansar Chand v. Punjab Industrial Bank Ltd.

opinion the best evidence would be the officer to whom the alleged credible information had been given. In most cases the officer concerned would be the Sub-Inspector of Police and in such a case I would say that the evidence of the Sub-Inspector of Police would be sufficient to meet the requirements of the law. The case will be returned to the Division Bench for disposal according to law.

Harries C. J. — I agree.

Din Mohammad J. — I also agree.

G.N. *Answer accordingly.*

[*Case No. 8.*]

A. I. R. (33) 1946 Lahore 31

HARRIES C. J. AND MAHAJAN J.

Puj Maya Rishi and others

v.

L. Ram Chand and others.

Second Appeal No. 1952 of 1943, Decided on 3rd July 1945, from decree of Dist. Judge, Jullundur, D/- 17th April 1943.

Hindu law—Religious endowment—Religious opinions or professions do not incapacitate any person from holding property—Descent of property from guru to chela does not warrant presumption that property is religious.

The mere fact that the person acquiring property in dispute is an ascetic does not establish that he acquired the property for religious purposes, though it is a circumstance that ought to be taken into consideration in determining whether it is religious or secular. The reason is, a man's religious opinions or professions do not make him incapable in law of holding property: ('43) 30 A. I. R. 1943 P. C. 7, *Foll.* [P 32 C 2; P 33 C 1]

So also, descent of property from a *guru* to his *chela* does not warrant the presumption that it is religious property: ('38) 25 A. I. R. 1938 P. C. 195 and ('39) 26 A. I. R. 1939 P. C. 201, *Rel on*; ('27) 14 A. I. R. 1927 Lah. 757, *held overruled* by Privy Council decisions noted above. [P 32 C 2]

In considering whether the property acquired by a Jain *puj* is religious or secular, in the absence of any direct evidence of dedication, the nature of the user of the property by the Jain community or Jain monks and whether such user, if any, was as of right or by permission and the length of time during which the user is suggested, have to be considered. [P 33 C 1, 2]

Hindu Law —

('40) Mulla, S. 424, Pt. (p)

Bhagat Singh — for Appellants.

J. L. Kapur and R. P. Khosla —

for Respondents.

Harries C. J.—This is a second appeal preferred by the defendants from concurrent decrees of the Courts below passed in favour of the plaintiffs in a suit for possession and ejectment. The plaintiffs, who are Jains, brought the present suit in a representative capacity. They claimed that the property in suit was an *upasara*, i.e., a

religious institution of the Jains, which had been dedicated to the Jain community. The defendants, on the other hand, claimed that the property was secular property and that they were entitled to possession of the same. The property in dispute was undoubtedly acquired by one Puj Kesar Rikh, predecessor of the defendants, by means of a compromise of a dispute between him and Gobind Ram and Mt. Bhagwanti. By this compromise Puj Kesar Rikh undoubtedly acquired this house for himself.

Puj Kesar Rikh, however, was a Jain Puj and Pujis normally are persons who have renounced the world and have given up all their worldly belongings. After the house was acquired, it was suggested by the plaintiffs that it was used as an *Upasara*, which is a place where Jain monks reside, impart religious instruction and carry on worship. According to the plaintiffs, the property was used for these purposes until the year 1927 when Puj Kesar Rikh died. He was succeeded by his *chela* Labh Chand and Labh Chand was actually in possession of the property when this suit was instituted. During the pendency of the proceedings Labh Chand died and the suit was carried on against his legal representatives who are the appellants now in this case. The trial Court came to the conclusion that the property in dispute was a Jain *Upasara* and was the property of the Jain community who was, therefore, entitled to possession as against the present appellants. The trial Court was of opinion that as Puj Kesar Rikh was a Puj, he could not acquire any worldly property for his own benefit. The Court held from the very fact that he was a Puj, that the property was acquired by him for the benefit of the Jain community generally. The learned Judge also held upon the evidence that since the acquisition of the property it has been used as an *Upasara* and, though the learned Judge does not specifically say so, it seems clear that in his view there had been something in the nature of a dedication by Puj Kesar Rikh to the Jain community. Accordingly, the trial Court decreed the plaintiffs' suit.

The appellants appealed to the Court of the learned District Judge, but the appeal was dismissed, though on different grounds. The learned District Judge rightly pointed out that the fact that Kesar Rikh was a Puj could not by itself determine the question whether the property remained secular in his hands. The learned Judge pointed out that a Puj, according to his vows, should

not own property, but there was nothing in law to prevent him. The learned Judge, however, upheld the trial Court upon a different ground. Though the learned District Judge was of opinion that in the hands of Puj Kesar Rikh the property throughout remained secular property, nevertheless, when it descended not to the natural heirs of Puj Kesar Rikh but to the latter's *chela*, the learned District Judge was of opinion that it must then be regarded as a religious property. Reliance was placed by the learned District Judge upon a Bench decision of this Court, A.I.R. 1927 Lah. 757,¹ in which it was held that if a *Sadhu* acquires property and does not devote it to religious purposes, he remains absolute arbiter of the disposal of the property, but if the property has once passed to a *chela*, in virtue of his being *chela* it is only reasonable to hold that the *chela* must treat the property as religious.

Accordingly, the learned District Judge held that in the hands of Labh Chand the property must be regarded as religious; therefore the plaintiffs were entitled to succeed. The defendants-appellants have now preferred a second appeal to this Court and it has been urged that the ground upon which the learned District Judge decided this appeal is wholly untenable. It is contended that the Bench decision in A.I.R. 1927 Lah. 757,¹ does not lay down good law and has in fact been overruled by two recent decisions of the Privy Council. It appears to me that the ground for the learned District Judge's decision cannot possibly be sustained. As I have said, he held that because the property passed to Labh Chand as a *chela* of Puj Kesar Rikh, it must be held to be religious property in Labh Chand's hands, though the learned District Judge had held that Kesar Rikh himself never appeared to have dedicated the property.

The question as to whether descent from *guru* to *chela* establishes the religious nature of a property was considered by their Lordships of the Privy Council in A.I.R. 1938 P. C. 195.² In that case their Lordships held that the fact that properties had descended from *guru* to *chela* did not necessarily lead to the conclusion that a property, when acquired by a *mahant*, lost its secular character and partook of a religious character. When

a person entered the Udasi order, he severed his connexion with the members of his natural family. It followed that neither he nor his natural relative could succeed to his property held by the other. There was, however, no reason for holding that an Udasi could not acquire private property with his own money or by his own exertions. If he did acquire private property, it could not be inherited by his natural relatives, but passed on his death to his spiritual heir including his *chela* who was recognised as his spiritual son. The descent of the property from a *guru* to his *chela* did not warrant the presumption that it was religious property.

This case was followed by their Lordships of the Privy Council in the following year in A.I.R. 1939 P.C. 201,³ in which it was held that if certain property was held by a person as his private property, the mere circumstance that it had subsequently descended from *guru* to *chela* would not warrant the presumption that it was religious property. In the present case, the property was acquired by Puj Kesar Rikh and had only descended on one occasion to a *chela*. In the Privy Council cases to which I have referred the property had descended from *guru* to *chela* on a number of occasions. It appears to me that these two decisions of their Lordships of the Privy Council make it impossible for a Court to hold that merely because the property descended from Puj Kesar Rikh to Labh Chand, his *chela*, it became a religious property in the hands of the *chela*. The Bench decision in A.I.R. 1927 Lah. 757¹ runs counter to these two later decisions of the Privy Council and this Bench decision, in my view, must now be regarded as overruled.

As I have stated earlier, the fact that Puj Kesar Rikh, who acquired the property in dispute, was an ascetic does not establish that he acquired the property for religious purposes, though that was the view of the trial Court. This matter was considered by their Lordships of the Privy Council in a very recent decision, A.I.R. 1943 P. C. 7.⁴ In that case their Lordships held that if a question arose whether particular property acquired by a given individual was acquired on his own behalf or on behalf of some other person or institution with whom or

1. ('27) 14 A.I.R. 1927 Lah. 757 : 102 I. C. 893, Ghansham Das v. Anant Singh.

2. ('38) 25 A.I.R. 1938 P. C. 195 : I.L.R. (1938) Lah. 453 : 32 S. L. R. 821 : 65 I. A. 252 : 175 I. C. 459 (P.C.), Pandit Parmanand v. Nihal Chand.

3. ('39) 26 A.I.R. 1939 P. C. 201 : I.L.R. (1939) Kar. P.C. 350 : 182 I.C. 753 (P.C.), Kartar Singh Bedi v. Dayal Das.

4. (43) 30 A. I. R. 1943 P. C. 7 : I. L. R. (1943) Kar. P. C. 1 : 206 I. C. 304 (P.C.), Raghbir Lal v. Mohammad Said.

with which he was connected, no doubt the circumstance that the individual so acquiring property was a professed ascetic might have importance. But it was out of the question to suppose that a man's religious opinions or professions could make him incapable in law of holding property. He might fail to act up to his professions or take heretical and inconsistent views without incurring any penalty or disability at law. It appears to me that this case establishes beyond all doubt that Puj Kesar Rikh, though a Jain Puj and an ascetic, could acquire property for his own benefit, though the religious vows which he had taken prohibited this. On the other hand, the fact that Kesar Rikh was a Puj is a matter which must be taken into consideration and their Lordships of the Privy Council point out that normally a truly religious man who has renounced the world and his worldly goods, would, if he acquired property, not acquire it for himself but would acquire it for the religious order or institution with which he was connected. Though it is by no means conclusive, the fact that Kesar Rikh was a Jain Puj is a factor which must be taken into consideration. The trial Court considered the evidence which had been adduced in this case at considerable length. There was a mass of evidence called on behalf of the plaintiffs which went to show that ever since the property was acquired by Puj Kesar Rikh in 1908, it had been used as an *Upasara* and had been resorted to by the Jain community for religious instruction and worship. As I have already said, the learned trial Judge appears to have thought that the user itself might be sufficient to establish dedication. The learned District Judge, however, has not considered this aspect of the case at all and merely disposed it of on the ground that it must now be regarded as religious property as it passed from a *guru* to a *chela*.

Before this case can be finally disposed of, it appears to me that the lower appellate Court must consider the evidence and decide whether or not the property acquired in 1908 was ever dedicated to the Jain community. It is true that there is no direct evidence of dedication, but dedication could be inferred from the conduct of Puj Kesar Rikh and Labh Chand and from the user of these premises. Whether such a dedication can be inferred must depend upon the evidence. Mr. Bhagat Singh has rightly pointed out that dedication is usually only inferred from user when the evidence covers a very long period of time. There is

force in that contention, but on the other hand much depends upon the nature of the user. If the nature of the user over a comparatively short period of time is such as to lead inevitably to the inference of dedication, then dedication must be inferred. In the present case I express no opinion as to what inference should be drawn in this case. The lower appellate Court must consider the evidence and decide for itself whether this property was dedicated to the Jain community either by Kesar Rikh or by his *chela* Labh Chand. The Court will bear in mind the nature of the user and whether the user by the Jain community or Jain monks, if any, was as of right or by permission. The Court will also bear in mind the length of time during which this user is suggested and will decide for itself what inference should be drawn. The case must, therefore, be remanded to the lower appellate Court to consider this aspect of the case and to decide whether dedication of this property to the Jain community can be inferred from the user of the disputed property. For these reasons I would allow this appeal, set aside the decree of the lower appellate Court and remand the case to that Court to be decided in the light of the observations made in this judgment and according to law. The costs of this appeal and the previous proceedings in the Courts below will abide the event. Monday 30th July is fixed for appearance of the parties in the Court of the learned District Judge.

Mahajan J.—I agree.

M.D./V.B.

Case remanded.

[Case No. 9.]

*** A. I. R. (33) 1946 Lahore 33**

HARRIES C. J. AND ABDUR RAHMAN J.

Lakhshmi Narain — Appellant

v.

Babu and another, Defendants and another, Plaintiff — Respondents.

First Appeal No. 53 of 1944, Decided on 18th April 1945, from order of Din Mohammad J., D/- 12th July 1944.

***(a) Civil P. C. (1908), O. 22, Rr. 10 and 11—** Interpretation of—Assignment pending suit — Assignee can be impleaded as party to appeal:

What R. 11, read with R. 10, means is that in making R. 10 applicable to appeals the word "suit" in R. 10 should be read as including an appeal and not that the word "suit" should be replaced by the word "appeal" that is to say the word suit should be read as "suit or appeal." Hence the appellate Court has jurisdiction to

implead an assignee as a party to the appeal even when the assignment was made in his favour during the pendency of the suit : ('35) 22 A.I.R. 1935 Lah. 119, *Dissent.*; *Case law discussed.*

[P 34 C 1 ; P 35 C 1 ; P 36 C 1]

(b) Civil P. C. (1908), O. 22, Rr. 10 and 11 — Rr. 10 and 11 are enabling.

The provisions contained in Rr. 10 and 11 do not make it incumbent upon an assignee to make an application during the pendency of the suit or appeal. These provisions are of an enabling character and entitle the assignee to do so if he so desires. He may not, however, choose to apply if he finds that his interests are being well looked after by his assignor. So long as he is of that view, it is not necessary for him to make an application for being brought on the record. [P 35 C 2]

Prem Chand Pandit — for Appellant.

Faqir Chand Mittal and Madan Mohan Lal Kapur — for Respondents.

Abdur Rahman J.—The question that we have been invited to answer is whether an appellate Court has jurisdiction to implead an assignee as a party to the appeal when the assignment was made in his favour during the pendency of the suit? Relying on a decision of a Division Bench of the Allahabad High Court in A. I. R. 1934 ALL. 442¹ which was followed by the Oudh Chief Court in A.I.R.1936 Oudh 224² the learned District Judge of Gurgaon answered it in the negative. It arises out of the following facts: Mt. Chambeli widow of Ramji Lal instituted a suit for the recovery of possession of two shops (A and B), a vacant site (C), situate in village Punahana, Tahsil Ferozepore Jhirka, and a plot of agricultural land, situate in village Gudhala, on 26th August 1941. One of the two shops mentioned above was sold by her to one Lakshmi Narain for a sum of Rs. 1000 on 27th August 1941 (Ex. D-10). Issues were framed in the suit on 20th October 1941. Lakshmi Narain did not apply to be impleaded as a party to the suit but he put in a power-of-attorney executed by Mt. Chambeli in his favour in the trial Court on 4th December 1941. The suit was decreed by the Subordinate Judge, Gurgaon, on 7th April 1942. The defendants preferred an appeal against the decree to the District Judge at Gurgaon on 21st April 1942 impleading Mt. Chambeli alone as a respondent through her Mukhtar Lakshmi Narain. Mt. Chambeli died on 7th June 1943 and the appellants in that Court brought her son Ram Kishore on the record as her legal representative. Since Ram Kishore was on his application allowed

to defend the appeal on 3rd November 1943 Lakshmi Narain made an application to be impleaded as a respondent. This was opposed both by the appellants and Ram Kishore and was rejected on 4th December 1943. Ram Kishore did not contest the appeal. It was allowed on the same date Lakshmi Narain has appealed against the order rejecting his application. The question formulated in the beginning of the judgment depends for its answer on the correct interpretation of O. 22, R. 10, sub-r. (1), Civil P. C., read with R. 11 of the same Order. They read as follows:

"Rule 10 (1). In other cases of an assignment, creation or devolution of any interest during the pendency of a suit, the suit may, by leave of the Court, be continued by or against the person to or upon whom such interest has come or devolved."

"Rule 11. In the application of this Order to appeals, so far as may be, the word 'plaintiff' shall be held to include an appellant, the word 'defendant' a respondent, and the word 'suit' an appeal." The learned Judges of the Allahabad High Court held in A.I.R. 1934 ALL. 442¹ that they had no jurisdiction to implead the assignee as a party to the appeal pending before them as the assignment had been made in his favour during the pendency of the suit. In their view the word 'suit' in R. 10 was used by the Legislature "in contradistinction of the word 'appeal'" and the word 'appeal' had to be substituted for the word 'suit' under the provisions of R. 10 of O. 22. They were of opinion that

'if the Legislature had intended that the word 'suit' should be deemed to include an appeal, it would have been wholly superfluous to enact the provisions of R. 11 of O. 22.'

The learned Judges of the Chief Court of Oudh followed the interpretation placed upon Rr. 10 and 11 by the Allahabad High Court although they were of opinion that the application by Rana Umanath Bux Singh was not maintainable as the deed in his favour did not constitute an assignment within the meaning of O. 22, R. 10, Civil P. C. These decisions were followed by a learned Single Judge of the Patna High Court in A. I. R. 1940 Pat. 177³ although the facts of that case were different, and by a learned Single Judge of the Madras High Court in A. I. R. 1940 Mad. 876.⁴ The same view prevailed with a learned Single Judge of this Court in A. I. R. 1935 Lah. 119⁵ although the facts of that case were also

1. ('34) 21 A. I. R. 1934 All. 442 : 149 I. C. 970, *Phul Chand v. Tahir Hussain.*

2. ('36) 23 A.I.R. 1936 Oudh 224 : 160 I. C. 801, *In re Umanath Bux Singh.*

3. ('40) 27 A. I. R. 1940 Pat. 177 : 189 I.C. 751, *Dirghayu Pande v. Kishori Kuer.*

4. ('40) 27 A.I.R. 1940 Mad. 876 : 193 I. C. 637, *Ratnasabapathi Pillai v. Gopala Iyer.*

5. ('35) 22 A.I.R. 1935 Lah. 119, *Kanti Chander Mukerji v. Pirbhu Dayal.*

distinguishable and the decision might still have been the same (as to the correctness of which I say nothing at present) even if the interpretation placed by the learned Judges of the Allahabad High Court in A. I. R. 1934 ALL. 442¹ had not been accepted by him.

On a close reading of the language used by the Legislature in R. 11 of O. 22, Civil P. C., I do not feel justified—and I say so with great deference—in accepting the view which prevailed with the learned Judges in the above mentioned cases. It must be, first of all, remembered that Rr. 10 and 11 are enacted for the benefit of an assignee (which may be for the sake of brevity taken in this judgment to include the persons covered by R. 10) but the Court is not bound to allow him to be brought on the record although it must be conceded that the Court cannot arbitrarily reject the prayer for impleading him as a party to the suit or the appeal as the case may be. Secondly, the words 'appellant', 'respondent' and 'suit' in R. 11 are not to be substituted for the words 'plaintiff', 'defendant' and 'appeal' respectively in the application of O. 22 to appeals as the learned Judges of the Allahabad High Court seemed to have thought in A. I. R. 1934 ALL. 442.¹ But according to the language employed by the Legislature in Rule 11 the word 'plaintiff' used in O. 22 has to be so read as to include an appellant. Similarly, the word 'defendant' has to include a respondent and the word 'suit' has to include an appeal. If, therefore, R. 10 has to be read in case of appeals in the way in which it is directed to be read by R. 11, I shall read it (R. 10) in the following manner: "In other cases of an assignment, creation or devolution of any interest during the pendency of *a suit or an appeal, the suit or appeal* may, by leave of the Court, be continued by or against the person to or upon whom such interest has come or devolved."

If R. 10 is to be so read—and I cannot see how it can be read otherwise—it will cover the case of a person who wishes to continue an appeal with the leave of the Court if an assignment had been made in his favour during the pendency of a suit. The doctrine of *lis pendens* would obviously apply to the transferee and render the transfer in his favour subservient to the rights of the parties to the litigation. The transferee would be, therefore, bound by the result of the litigation whether given in the suit or in an appeal from a decree passed in that suit. The appeal must, therefore, be regarded as a continuation of the suit as far as he is

concerned. The words "so far as may be" used in R. 11 help the construction which I am inclined to put on Rr. 10 and 11 as the obvious intention of the Legislature was that an assignee might be able to take advantage of the provisions of these rules which were enacted for his benefit and that intention has been, in my view, fairly well expressed by the language used in R. 11.

The word 'suit' in R. 10 may have been used in contradistinction to the word 'appeal' but that distinction was clearly obliterated by R. 11. The Legislature clearly intended so to do. Nor can I understand the point of the remark—and I say so again with very great deference—that if the Legislature had intended that the word 'suit' in O. 22 should be deemed to include an appeal, it would have been wholly superfluous to enact the provisions of R. 11 of O. 22. The very words used by the Legislature in R. 11 furnish an answer to it. They clearly state that the word 'suit' shall include an appeal in applying O. 22 to appeals. Moreover, but for R. 11 the provisions contained in R. 10 could not have applied to appeals and an assignee could not have been brought on the record even if the assignment had been made in his favour during the pendency of the appeal. The provisions of R. 11 were not, therefore, superfluous and were intended to include the appeal.

The provisions contained in Rr. 10 and 11 do not make it incumbent upon an assignee to make an application during the pendency of the suit or appeal under the provisions of O. 22, Rr. 10 and 11. These provisions are of an enabling character and entitle him to do so if he so desires. He may not, however, choose to make an application if he finds that his interests are being well looked after by his assignor. As long as he is of that view, it is unnecessary for him to make an application for being brought on the record. But when he makes the application and the Court is not inclined to reject it either on the merits or in its exercise of proper judicial discretion, it cannot be turned down on the ground that it is not competent as the assignment was made in his favour during the pendency of the suit and he was making an application under Rr. 10 and 11 during the pendency of an appeal from the decree passed in that suit. He would be after all bound by the judgment and it is only right that he should be allowed to come on the record and protect his interests if he desires so to do.

A perusal of O. 22, R. 9, Civil P. C., leads me to the same conclusion. Sub-rule (1) of

that rule reads as follows : "Where a suit abates or is dismissed under this order, no fresh suit shall be brought on the same cause of action." If the word 'appeal' has to be merely substituted for the word 'suit' as held by the learned Judges of the Allahabad High Court in A. I. R. 1934 ALL. 442,¹ it would read as follows : "Where an appeal abates or is dismissed under this order, no fresh appeal shall be brought on the same cause of action." Does it mean then that the plaintiff-appellant would be entitled to institute a fresh suit and is only debarred from bringing a fresh appeal ? Obviously not. If the appeal abates and if the plaintiff happens to be the appellant, he is debarred both from bringing a fresh suit on the same cause of action or filing a fresh appeal. This construction could only be placed if the words 'or appeal' are added after the word 'suit.' Rule 9 would then read as follows :

"Where a suit or an appeal abates or is dismissed under this order, no fresh suit or appeal shall be brought on the same cause of action."

In other words, if a suit abates, a fresh suit could not be brought; but if an appeal abates, no fresh suit or appeal could be brought on the same cause of action. Applying the above principles, I would not follow the decisions in A. I. R. 1934 ALL. 442,¹ A.I.R. 1935 Lah. 119,⁵ A. I. R. 1936 Oudh 224,² and A. I. R. 1940 Pat. 177³ and am of the view that the interpretation which had prevailed with another learned Single Judge of the Madras High Court in A.I.R. 1938 Mad. 757⁶ although it was not brought to the notice of Patanjali Sastri J. in A.I.R. 1940 Mad. 876⁴ was the correct one. The same view was also expressed in a very recent case by a learned Single Judge of the Nagpur High Court in A. I. R. 1944 Nag. 137.⁷ For the above reasons I would answer the question formulated in the beginning of this judgment in affirmation. I had assumed for the purposes of this appeal that Mt. Chambeli's interests in one of the houses in suit had been assigned in favour of the appellant. This question does not seem to have been gone into so far but must be decided before the application made by the appellant to be impleaded as a party to the appeal can be finally disposed of.

In the end I might add that I have refrained from discussing the question as to whether an application can be made by an

assignee if the assignment is made in his favour after the decision of a suit but before the filing of the appeal from that decision, i. e., neither during the pendency of the suit nor during the pendency of the appeal. The interpretation which I have placed on Rr. 10 and 11 may not be of much help to an assignee of that type, but it is quite possible to conceive that he may be competent to make an application to be impleaded as a party under some other provisions or principles of law. For the above reasons I would allow the appeal and send the record back to the lower appellate Court for deciding Lakhshmi Narain's application in the light of the observations contained in this judgment. If his application is allowed, the judgment passed by the lower appellate Court on Ram Kishore's confession shall stand vacated and another judgment will have to be delivered after hearing all the parties to the appeal. But if Lakhshmi Narain's application is rejected on the merits, the judgment pronounced by the lower appellate Court need not be disturbed—although in that case Lakhshmi Narain will have such rights as are conferred upon him by law. Lakhshmi Narain must have the costs of this appeal. The costs before the lower appellate Court will be as may be directed by that Court.

Harries C. J.—I agree.

G.N.

Appeal allowed.

[Case No. 10.]

A. I. R. (33) 1946 Lahore 36

DIN MOHAMMAD AND TEJA SINGH JJ.

Basheshar Dayal — Petitioner

v.

Emperor.

Criminal Misc. Petn. No. 592 of 1945, Decided on 6th July 1945.

(a) Criminal P. C. (1898), S. 491 — S. 16 (1), Defence of India Act (1939), is no bar to inquiry by Court of good faith in arrest — Abuse of power under R. 129, Defence of India Rules — Court can grant relief under S. 491, of the Criminal P. C.

In spite of S. 16 (1), Defence of India Act, the High Court is competent to determine whether the arrest has really been made under R. 129, Defence of India Rules, or has been made in bad faith for a collateral purpose and is, for that reason, an abuse of power and fraud upon the statute. If the High Court arrives at the conclusion that R. 129 does not apply it can afford the relief prayed for under S. 491, Criminal P. C. : ('43) 30 A. I. R. 1943 Lah. 41 (F. B.); and ('44) 31 A. I. R. 1944 Lah. 373, *Rel. on* ; ('45) 32 A. I. R. 1945 Nag. 8, *Foll.*

[P 37 C 2]

6. ('38) 25 A.I.R. 1938 Mad. 757 : 178 I. C. 205, Alagar Raja v. Narayana Raja.

7. ('44) 31 A. I. R. 1944 Nag. 137 : I.L.R. (1944) Nag. 520 : 216 I. C. 65, Wright Neville v. E. H. Freser.

(b) Defence of India Rules (1939), R. 129 — Courts must determine reasonableness of suspicion — Petitioner making affidavit — Duty of Crown to file counter-affidavit — Detention under R. 129 to facilitate investigation into crime is misuse of R. 129.

Under R. 129, Defence of India Rules, the Court and not the police, must decide the question of the reasonableness of suspicion. Even if the burden is initially on the petitioner to make out the case that the arrest was illegal and mala fide, where he puts in a affidavit, duly sworn, it is the duty of the Crown to put in a counter affidavit controverting the petitioner's allegations and showing the ground on the strength of which the detenus were suspected of hampering the prosecution of war. Moreover, under the pretence of exercising powers under R. 129 the police cannot conduct investigation into a crime. If the police desire an investigation, they should proceed in accordance with the provisions of Criminal Procedure Code. If no ground for detention is made out by the police or if detention is made for facilitating investigation into a crime it is misuse of R. 129: (1945) 32 A. I. R. 1945 Nag. 8, *Foll.* [P 38 C 2 ; P 39 C 1 ; P 40 C 1, 2]

(c) Defence of India Rules (1939), R. 129 (2) — Report under sub-r. (2) to Provincial Government not sent — Authority to detain from Provincial Government not existing — Detention is ultra vires.

Assuming that the making of the report under R. 129 (2) does not affect the legality of the arrest of the detenus, it is the duty of the Crown to satisfy the Court that their detention after the arrest was in accordance with the directions given by the Provincial Government. If such authority does not exist the detention of the detenus beyond 15 days is ultra vires. [P 41 C 1]

J. G. Sethi and M. L. Sethi — for Petitioner.

Jhanda Singh for Advocate-General — for the Crown.

Teja Singh J. — One Bashesar Dayal has made this application under S. 491, Criminal P. C., praying that his brother Baij Nath and Khushia Singh be brought before the Court and be set at liberty. The facts set out in the petition briefly are as follows. Baij Nath and Khushia Singh were in the service of a contractor named Taj Din who was under a contract to supply vegetables, poultry, fresh eggs and fish to the Military both at Jullundur and Hoshiarpur. Later on he assigned the contract relating to the supply of poultry, fish and eggs to Faqir Mohammad. The C. I. D. on the receipt of information that the contractors had committed some offence in connection with their contracts and with a view to establish a case under S. 161, Penal Code, against certain Supply Officers or the contractors, arrested Baij Nath and Khushia Singh on 5th or 6th June 1945 and were keeping them in their custody. Neither of them had been produced before any Magistrate since their arrest. Paragraphs 5 and 6 of the petition

sum up the petitioner's case and may be reproduced in *verbatim*.

"(5) That the petitioner has reason to believe that the two persons are being detained by Ch. Sahib Singh, C. I. D., Sub-Inspector, with a view to coerce them to make some statement to implicate some supply officers or any one of the above mentioned contractors for an offence under S. 161, Penal Code.

(6) That even if Baij Nath and Khushia Singh are themselves implicated or are liable to be implicated for offence under S. 161, Penal Code, the offence is bailable and their detention in police lock-up from 5th June 1945 up to date is illegal. The petitioner has heard that the police have been contending that the two persons above mentioned are being detained under R. 129, Defence of India Rules. The petitioner submits that R. 129, has no applicability and the said persons are being illegally detained and are entitled to be set at liberty."

The petitioner came up for the first time before my learned brother Din Mohammad J. on 27th June 1945, and he ordered Ch. Sahib Singh, Sub-Inspector, C. I. D., to appear before him with all the relevant papers. Ch. Sahib Singh appeared on 2nd July 1945 and after admitting that Baij Nath and Khushia Singh were in custody of the police stated that they had been arrested by him under the orders of the Inspector, C. I. D., under R. 129, Defence of India Rules, because they were 'hampering the efficient prosecution of war' by seriously damaging war supplies. In view of the importance of the question involved the case was then referred to the Division Bench. Baij Nath and Khushia Singh were summoned in Court and their statements were recorded. We also recorded the statement of Ch. Sahib Singh on 4th July. A supplementary statement of his has been recorded today. To these statements I shall refer hereafter.

The questions involved in the case are (1) whether the allegations of the petitioner contained in Paras. 5 and 6 of the petition referred to above are true and (2) whether on these allegations this Court is competent to order their release under S. 491, Criminal P. C. As regards the second question, it is covered by ample authority and it is well settled that in spite of S. 16, Defence of India Act, that no order made in exercise of any power conferred by or under this Act shall be called in question in any Court, we are quite competent to determine whether the arrest had been really made under R. 129 or whether it had been made in bad faith for a collateral purpose and was hence an abuse of power and fraud upon the statute and if we come to the conclusion that R. 129 has no application we can afford the relief

prayed for. The first case that I wish to refer in this connexion is A. I. R. 1943 Lah. 41¹ decided by a Full Bench. In that case a requisition order had been issued by the Provincial Government under R. 75A, Defence of India Rules, acquiring the property of the Lahore Electric Supply Co. It was held that if the Court was satisfied either that the order under the Act was *ultra vires* or that it was not made *bona fide* but was made for some collateral object, it could interfere. The next case is A. I. R. 1944 Lah. 373² decided by a Division Bench consisting of the Hon'ble the Chief Justice and Mehr Chand Mahajan J. In that case Dilbagh Singh and others were originally arrested by the police under S. 420, Penal Code, but were later on detained under R. 129, Defence of India Rules. The learned Judges after referring to the Full Bench case came to the conclusion that they were bound to hold that if there had been a misuse or an abuse of the powers given to the police and the Provincial Government by R. 129, the orders passed were not orders under R. 129 and therefore could be questioned in a civil Court in spite of S. 16 (1), Defence of India Act. The following passage from the judgment of the Hon'ble the Chief Justice, with which Mahajan J. agreed, may be quoted with advantage:

"In my judgment it is abundantly clear in this case that there has been an abuse of the powers given to the police by R. 129, Defence of India Rules. Admittedly they have used their powers under these rules not for any purpose connected with the defence of India or the efficient prosecution of the war but merely to enable them to investigate a crime under the Penal Code more easily and possibly more efficiently. They have used these powers deliberately to deprive the persons accused under S. 420 of their ordinary rights under the Code of Criminal Procedure and I cannot imagine a greater misuse of the powers conferred by R. 129."

Both these cases were followed by me while sitting in Single Bench in Criminal Misc. No. 582 of 1944.³ The Sub-Inspector of Nathana police-station had arrested a person under R. 129, Defence of India Rules. One Bachan Singh made an application under S. 491, Criminal P. C., and contended that R. 129 had been misused and the arrest had been made because the detenu had annoyed, and incurred the displeasure of the Sub-Inspector and the Head Constable of Nathana police

station. The Crown took up the position that the arrest had been made under the orders of the Inspector

"who had reliable information that the detenu had been consistently acting in a manner prejudicial to public safety and to the efficient prosecution of the war, by deliberately aiding in various ways the outlaw element in their activities calculated to spread lawlessness and terror in the *ilaga* of police station Nathana and the adjoining territories in the native States."

Both sides put in affidavits and even examined evidence in respect of their respective allegations. I held that the arrest had been made by the Sub-Inspector, that there was no material on the strength of which the Sub-Inspector, or for the matter of that any police-officer could suspect that the detenu had acted or was acting or was about to act in a manner prejudicial to the public safety or the efficient prosecution of the war, that the real reason of the arrest was that the detenu had been making complaints against the Sub-Inspector and the police of his thana and that the arrest was *mala fide* and was not covered by R. 129, Defence of India Rules. On these findings I accepted the petition and ordered the detenu to be released. In the presence of these rulings of our own High Court it is not necessary to refer to the decisions of other High Courts, but I wish to cite the latest case on the point, A. I. R. 1945 Nag. 8,⁴ the facts of which are analogous to those of the present case. Two persons were arrested by the police under R. 129, Defence of India Rules. The petitioner who moved the High Court contended that it appeared to them that the police were investigating into an offence of dacoity and the inquiries made by them suggested that the arrest had been made in connexion with an attempt to trace the offenders in the dacoity. The learned Judges accepted the petitioner's contentions and holding that the detention of the persons concerned was illegal and improper directed them to be set at liberty. The words of R. 129 are:

"Any police officer, or any other officer of Government empowered in this behalf by general or special order of the Central Government, (or of the Provincial Government) may arrest without warrant any person whom he reasonably suspects of having acted, of acting, or of being about to act, with intent to assist any state at war with His Majesty, or in a manner prejudicial to the public safety or to the efficient prosecution of war, etc."

The learned Judges of the Nagpur High Court held that under R. 129 the Court must decide the question of reasonableness and not the police and that the burden of proof

1. ('43) 30 A.I.R. 1943 Lah. 41; I.L.R. (1943) Lah. 617 : 205 I.C. 337 (F.B.), Lahore Electric Supply Co. v. The Province of Punjab.

2. ('44) 31 A. I. R. 1944 Lah. 373 : 217 I. C. 162, Dilbagh Singh v. Emperor.

3. Reported in ('45) 32 A. I. R. 1945 Lah. 293, Teja Singh v. Emperor.

4. ('45) 32 A. I. R. 1945 Nag. 8 : I. L. R. (1945) Nag. 6, Vimalabai Deshpande v. Emperor.

lies on the police. While discussing the powers conferred by the Defence of India Act and the rules framed thereunder this is what they observed :

"Under the Defence of India Act nothing is to be altered, no rights or liberties to be interfered with, no privileges withdrawn or curtailed, except as expressly provided by or under the Act. The ordinary laws are to continue to function except and in so far as they are expressly altered by or under the Act. Even when they are altered the special powers conferred are to be used sparingly, and the ordinary lives and avocations of those proceeded against under the Act and its rules are to be interfered with as little as possible, and only to the extent consonant with the public safety and interest and the defence of British India. These conditions are express and restrictive. They are fundamental. The Act and the rules must be construed in the light of them."

The other question is one of fact and has to be decided in the light of evidence available to us. I respectfully agree with the learned Judges of the Nagpur High Court that the burden of proving the reasonableness of the suspicion lies upon the Crown and I expected that it would adduce some evidence in the shape of affidavit by the Inspector, who is alleged to have ordered the arrest, but this has not been done. I am inclined to think that even if the onus lay upon the petitioner to make out a case that the arrest was illegal and mala fide, since he has put in a duly sworn affidavit I believe that it was the duty of the Crown to put in a counter affidavit controverting the petitioner's allegations and indicating the ground on the strength of which the detenus were suspected of hampering the prosecution of war. In fact we even once adjourned the case so that the Crown might have the opportunity to place material on record to enable us to come to the conclusion that the detention of Baij Nath and Khushia Singh was justified (*see* our order of the 4th July). The Crown has not, however, availed of this opportunity. There could possibly have been two reasons for this, one that the advisers of the Crown are ignorant of the requirements of law and they appear to be under the impression that whatever be the allegations of the petitioner the Court cannot interfere with an order passed under R. 129, Defence of India Rules, and second that the position taken up by the petitioner so far as the question of fact is concerned is so unsailable that no one on behalf of the Crown is prepared to come forward and deny his allegations on oath. I do not think that the first can be the real reason, so I am constrained to hold that the second reason must hold good. As regards the attitude that the

Crown is expected to adopt in cases of this kind I cannot do better than quote the following passage from the judgment of the Nagpur case :

"On an application under S 491, Criminal P. C., on behalf of a person detained under R. 129, Defence of India Rules, when no issue of fact requiring an answer is raised, it is not necessary to file an affidavit in the first instance if the return is good on the face of it. But it is always wise to do so. It assists the Court. It avoids unnecessary waste of time, and it obviates attacks on Government's good faith. Candour and frankness are always appreciated. But if an issue of fact is raised in the application then an affidavit in reply refuting the facts, or explaining them away, is always necessary, and should be filed along with the return so as to obviate unnecessary delay. Otherwise the truth of the facts alleged will normally be accepted."

A word need be said regarding the statement made before us by Sub-Inspector Sahib Singh. He deposed that the detained persons were suspected of hampering the efficient prosecution of war in conspiracy with others, but he did not like to divulge the names of their alleged conspirators on the plea that it was a secret matter. He was then asked if he had any material in writing justifying the suspicion. The answer was that the material was in existence but was not in his possession. Then he was asked whether he was prepared to place that material before the Court. His answer was: "This is secret. I claim protection" The question whether there was any case of bribery or cheating against the Officers of the Supply Department or the contractors under investigation elicited the same answer. The detenus stated that their houses had been searched and certain account books had been removed from their possession. The Sub-Inspector when questioned on the point denied that he had made any search. (His Lordship after stating the questions put to the Sub-Inspector on the point and the answers given by him, proceeded.) When the statement was read out to the Sub-Inspector on its conclusion he added that the books of account were taken possession of from Baij Nath and Khushia Singh in relation to a case under S. 420, Penal Code, against a person most probably named Bashir Ahmad whose whereabouts have so far not been traced.

We had that report produced in Court and went through it. In my opinion, there was nothing in that report justifying the searches of the houses of Baij Nath and Khushia Singh or the removal of their account books. It may here be mentioned that the Sub-Inspector was good enough to bring the books of account to Court and after we

had examined Baij Nath and Khushia Singh about their contents we took his statement and he admitted that they relate to Military contract held by Taj Din and Faqir Mohammad for the supply of eatables to the Military Department. He also admitted that the books contain certain entries which relate to the payment of illegal gratification to the Military Officials either in kind or in cash. He no doubt tried to show that he considered the above mentioned entries relevant to prove that the detenus had been hampering the efficient prosecution of the War, inasmuch as they related to the supply of eggs and poultry to the Supply Officers instead of the Military, for whom they were really meant, but there is absolutely no force in the contention. It is not even alleged that the contractors' stock was limited, that illegal gratification given to the Supply Officers in kind resulted in short supplies to the Military and that this in any way affected or was likely to affect the health and the efficiency of the Military. In my opinion, the real reason for taking the books of account into possession appears to be that they could be used as evidence against the contractors for giving, and against the Supply Officers for accepting, illegal gratification. This also supports the petitioner's contention that Baij Nath and Khushia Singh were arrested and are being detained in order to be made witnesses in the bribery cases that the police contemplate starting against contractors and the Supply Officers. There can be no two opinions about the necessity and desirability of investigating cases of alleged bribery and when engaged in that task the police deserve all sympathy and help. But at the same time they cannot be allowed to transgress the clear provisions of law. If the C. I. D. had genuine reason to believe that the persons, with whose detention we are dealing in the present case, were in possession of useful information in connexion with an offence committed by the contractors and Supply Officers under S. 161, Penal Code, or that their books of account were likely to throw light upon the matter, they had ample powers under the Code of Criminal Procedure to interrogate them and to take hold of their books of account. But surely they had no right or justification to arrest them under R. 129 on the imaginary grounds that they were hampering the efficient prosecution of the war. Unfortunately, we have nothing before us to show on what grounds the Inspector who ordered the Sub-Inspector

to effect the arrests came to suspect that the detenus were obstructing the efficient prosecution of the war. But from what the Sub-Inspector has stated before us I have not the slightest doubt that he could have had no ground at all. I am aware that the Sub-Inspector has referred to certain information which he considered to be secret and which he, therefore, did not place before us, but he was not able to show on what ground he claimed the privilege, and Mr. Jhanda Singh, learned counsel for the Crown, frankly admitted before us that no privilege could be claimed in this case. In my judgment, either the material described by the Sub-Inspector as secret did not exist at all or if it did it was not produced in Court because it could not be helpful to the Crown. At this stage I wish to reproduce another passage from the judgment of the Nagpur case regarding the practice of detaining persons in connexion with the investigation of cases :

"The provisions relating to detention are to be found in Rr. 26 and 129, Defence of India Rules. But they relate to detention and to nothing else. They confer wide powers, but even they have their limitation Up to the present, all we need say is that if either the police or the Provincial Government desire an investigation into any offence, whether under the Penal Code or under the Defence of India Rules, then they are bound to conduct their enquiry in accordance with the provisions of the Criminal Procedure Code. They cannot call in aid their powers of detention and in the guise of exercising those powers conduct a secret investigation into a crime. If they have information that these detenus have committed crimes or offences, they are not bound to investigate into them. They can rest content with detaining them under R. 26 or R. 129 provided the matter falls within the ambit of those rules. But if they want an investigation they must proceed in accordance with the provisions of the Criminal Procedure Code. If they do otherwise it is a fraud upon the Act and their action is not taken in good faith. They cannot make the best of both worlds."

On consideration of the facts I hold that there was absolutely no ground for the Sub-Inspector or the Inspector, C. I. D., to arrest the detenus under R. 129 and that rule did not apply. I further hold that it was a manifest misuse of the rule and the arrest was illegal and *ultra vires*.

It was further argued by Mr. J. G. Sethi that the detention of Baij Nath and Khushia Singh by the Sub-Inspector or for the matter of that by the police in this case was illegal for another reason and that is that the requirements of sub-r. (2) of R. 129 regarding the detention of the prisoners in custody were not satisfied. It is definitely laid down in sub-r. (2) that an officer who makes an arrest in pursuance of sub-r. (1)

shall forthwith report the fact of such arrest to the Provincial Government, and, pending the receipt of the orders of the Provincial Government, may, subject to the provisions of sub-r. (3), by order in writing commit any person so arrested to such custody as the Provincial Government may by general or special order specify, provided that no person shall be detained in custody under this sub-rule for a period exceeding 15 days without the order of the Provincial Government. It is true that by virtue of Notification No. 1353H (M)-42/9991 dated 21st February 1942 the powers vested in the Provincial Government were delegated to the District Magistrate, and the District Magistrate did pass an order extending the prisoners' period of detention under the proviso to sub-r. (2) but that merely authorised the District Magistrate to keep them in custody. I am not satisfied from the Sub-Inspector's statement that he made any report to the Provincial Government after the detenus' arrest, nor there is anything to show that any such report was made by the Inspector. Even assuming that the making of the report does not affect the legality of the detenus' arrest, it was the duty of the Crown to satisfy us that their detention subsequent to the arrest was in accordance with the directions given by the Provincial Government. But no such direction has been produced before us. The learned counsel for the Crown was not even sure that any directions were issued at all. This fact, however, may not be very material, since both sides are agreed that the prisoners are now being detained under the orders of the District Magistrate, but as I have already pointed out, the order of the District Magistrate is that they should be detained in his (District Magistrate's) custody. No order was forthcoming authorising their detention in the custody of the Sub-Inspector or of any police-officer. We put a number of questions to the Sub-Inspector on this point and though he said that he was not aware if any authority had been given by the District Magistrate to the police he was definite that there was no authority so far as he was concerned. Had there been any general authority given by the District Magistrate to the police the same should have been produced before us, but this was not done. Consequently I cannot but hold that no authority existed and the detention of Baijnath and Khushia Singh by the police was *ultra vires*. In the result I would order that the detenus who are present in Court be set at liberty forthwith.

Din Mohammad J. — I entirely agree and have nothing to add.

V.B.

Application allowed.

[Case No. 11.]

A. I. R. (33) 1946 Lahore 41

TEJA SINGH AND MOHAMMAD SHARIF JJ.

Hans Raj Singh

v.

Emperor.

Criminal Appeal No. 255 of 1945, Decided on 21st November 1945 from order of Addl., Sessions Judge, Amritsar, D/- 7th February 1945.

Penal Code (1860), Ss. 300 Excep. 4, 302 and 304 Part II — Death caused by thrust of knife lying by side of accused on sudden quarrel — Knife in use of accused in ordinary course of his business — No enmity between accused and deceased — Section 304, Part II, and not S. 302, applies — 'Fight' in S. 300 Excep. 4 — Meaning of — Blows by each party whether essential.

A was charged with murder of B. A and B exchanged abusive language of ordinary type. A thrust a knife of ordinary size which was lying by his side and which was used by him in the ordinary course of his business, in the abdomen of B who was empty handed, resulting in B's death. There was no previous enmity between A and B.

Held that A's offence did not fall under S. 302 but under S. 304, Part II: *Case law discussed.*

[P 43 C 2 ; P 46 C 1, 2 ; P 47 C 1]

Per *Mohammad Sharif J.* — Exception 4 to S. 300 aptly applies to the offence as all the ingredients of Excep. 4 including sudden fight and not acting in a cruel or unusual manner are satisfied. If A beats B without B having beaten A it can nevertheless be a fight. In order that Excep. 4 may apply it is not necessary that there should have been blows on each side. A word or a gesticulation may be as provocative as a blow. [P 43 C 1, 2]

Per *Teja Singh J.* — Exception 4 to S. 300 does not apply as there was no sudden fight within the meaning of Excep. 4. If a person gives blow to another there will be fight only if the latter hits him back or at least he gets ready and tries to assault but none if he merely keeps quiet and does nothing. In the latter case it will be only a one sided attack and not a fight. If there is an exchange of blows the fact that the person assaulted hits back in self-defence does not make any difference. If in the course of a sudden quarrel one of the parties gives a blow to his opponent and that blow causes death he cannot avail of the advantage of Excep. 4, notwithstanding that after he has given the blow he is belaboured by the deceased, before he dies or by his companions, for the simple reason that at the time he gave the fatal blow there was no fight: *Case law discussed.*

[P 46 C 1]

Penal Code —

(36) Gour, Page 1005 N. 3343.

(45) Ratanlal, Page 726.

Ved Kumar Ranade, M. L. Sethi and Gurdev Singh — for Appellants.

Bhagwan Das Mehra and Harbans Singh Doabia for Advocate-General — for the Crown.

Mohammad Sharif J.—Three persons, i. e., the two appellants and one Rattan Singh, were tried by the Additional Sessions Judge at Amritsar for having caused the death of one Ghulam Mohammad on 19th October 1944 and for causing injuries to others. Rattan Singh has been acquitted and the present appeal is by the other two, one of whom, i. e., Hans Raj Singh, was convicted under S. 304, Part II, Penal Code, and sentenced to eight years' rigorous imprisonment, while the other appellant, Chanan Singh, was sentenced to one year's rigorous imprisonment under S. 324, Penal Code. The Crown has also appealed against the conviction of Hans Raj Singh on the ground that the case fell under S. 302, Penal Code, and not under S. 304, Part II, as held by the learned Additional Sessions Judge.

The prosecution story is that Ghulam Mohammad deceased had only recently opened a grocery shop opposite to that of Hans Raj Singh appellant which caused some bitterness between the parties. On 19th October at about 6 P. M. Ghulam Mohammad deceased went to the shop of Hans Raj Singh to purchase *pakorās*. On this Hans Raj Singh who was sitting there along with Chanan Singh and Bachan Singh said that he, i. e., Ghulam Mohammad deceased, had the audacity to start a shop in competition but could not prepare *pakorās* himself. This led to a quarrel between the parties and an exchange of abuse. Suddenly Hans Raj Singh took up the *chhuri* which was lying with him and thrust it in the abdomen of the deceased who fell down there and died immediately. Chanan Singh appellant is said to have given a blow with another *chhuri* to one Kaila and Bachan Singh is said to have given a blow on the arm of one Niamat Ali, P. W. The first information report was made at 10.30 P. M. at police-station Sadr, Amritsar which is at a distance of about six miles from the village. It is curious that in the first information report one Bachan Singh son of Gurdit Singh Lubhana was mentioned as one of the assailants but soon after when the investigation was taken in hand we do not find any mention of his name anywhere. On the other hand, it is found that one Rattan Singh had been substituted in his place and during the course of the trial nobody ever cared to ask how it was that instead of Bachan Singh who was originally mentioned one Rattan Singh was sent up for trial. Since Rattan Singh has been acquitted by the learned Additional Sessions

Judge this point is no longer of any importance.

The occurrence is said to have been witnessed by Ismail, real brother of the deceased, who made the first information report, one Kaila, i. e. Ghulam Mohammad *alias* Karnail Singh, who is also said to have received some injuries; Niamat Ali, Hakim Ali, Sardara and Shah Mohammad. Hakim Ali was examined as P. W. 4. He says that he himself received some injuries at the hands of Chanan Singh but there is no mention of this in the first information report. This now, therefore, appears to be an after-thought, and looking to the nature of his injuries, which are simple superficial scratch marks, may have been caused at any other place or in any other manner. P. W. 5 Ismail, is the real brother of the deceased and was at the spot. P. W. 6 is Niamat Ali. He is the brother of Hakim Ali (P. W. 4). P. W. 7 is Shah Mohammad who is a cousin of Hakim Ali P. W. and P. W. 8, Sardara, originally a resident of another place, had come to this village a few days before and was staying with one Ramzan brother of Shah Mohammad P. W. The only argument advanced by the learned counsel for the defence is that all these persons are closely related to one another. It is no doubt true that they are so but these are the persons who were either near the spot or were attracted to the spot on hearing the quarrel that had started between the deceased and the accused at the shop of the latter. It is also undeniable that the deceased met his death near the shop of the accused and was lying in front of that shop even at the time when the police reached the scene.

We have gone through the evidence of these witnesses and beyond the fact that they are related to one another there is nothing to throw any doubt on the truth of their statements. But there does appear a distinct improvement upon the original version given by them to the investigating officer. It is now stated by them that the other accused, i. e., Chanan Singh, had actually instigated Hans Raj Singh to kill Ghulam Mohammad deceased. We are not prepared to believe that this was so, nor was it ever before stated in the first information report. It is also difficult to believe that when some of the prosecution witnesses, who also received some injuries in the course of the scuffle, went to rescue the deceased they were given injuries by persons other than Hans Raj Singh who admittedly had the knife with him. Niamat Ali P. W. had

only two incised wounds which he says were given to him by Rattan Singh, and Chanan Singh is said to have caused some injuries to Ghulam Mohammad alias Kaila. Kaila appeared before the Committing Magistrate but did not appear afterwards before the Additional Sessions Judge. Kaila had only one incised wound and there is nothing to indicate that it was not and could not have been given by Hans Raj Singh himself who had already fatally stabbed the deceased. The name of Chanan Singh, therefore, appears to have been wrongly introduced by these prosecution witnesses. Chanan Singh's part in the affair is not proved by any reliable evidence and the probabilities are that he was mentioned because he happened to be present at the time with the accused. I, therefore, hold that the part ascribed to Chanan Singh is not free from doubt and acquit him of the charge under S. 324, Penal Code, and set aside the sentence. As regards Hans Raj Singh his guilt is clearly established by the evidence on the record and his conviction is, therefore, maintained. As to appeal by the Crown the contention is that the offence does not fall under Exception 4 to S. 300 but falls under S. 302 as (a) though there was an exchange of abuse but no blow was given by the deceased and there was, therefore, no fight, and (b) the accused acted in a cruel or unusual manner as he used the *chhuri* against a person who was empty handed.

As regards (a), it is argued that the fight postulates that both the parties should have exchanged blows and if only one gave a blow it was not a fight. This is putting too rigid a construction. The word 'fight' is nowhere defined. Its ordinary dictionary meaning as given in Webster's is "A struggle or contest of any kind," and a contest means "Earnest struggle for superiority, victory, strife or argument." If A beats B without B having beaten A it could never the less be a fight. No authority was cited to show that in order to apply Exception 4 it is essential that there should have been blows on each side. A word or a gesticulation may be as provocative as a blow. As to (b) the accused was sitting at his shop with his *chhuri* by his side which is freely and ordinarily used in the course of his business. In the heat of the moment he takes it up and strikes and it was an accident that it struck a vital part of the body. Exception 4 to S. 300 is as follows:

"Culpable homicide is not murder if it is committed without premeditation in a sudden fight in

the heat of passion upon a sudden quarrel and without the offender's having taken undue advantage or acted in a cruel or unusual manner."

As Ratan Lal's Commentary at p. 726 (1945 edition) says, this exception requires three things: (1) Sudden fight; (2) absence of premeditation; and (3) no undue advantage. It matters not what the cause of the quarrel is, whether real or imaginary, or who draws or strikes first; provided the occasion be sudden, and not urged as a cloak for pre-existing malice. The word 'sudden' only means that the fight should not have been pre-arranged. It cannot be disputed that there was a sudden quarrel without any premeditation and at the time when the parties engaged in a mutual abuse nobody had any idea of one beating the other. The learned counsel for the Crown argues that it was not open to Hans Raj Singh to take up the *chhuri* and thrust it in the abdomen of the deceased who had done no more than to exchange some abuses with the accused. It has been shown above that the *chhuri* was lying there and it was used because it was handy. The above discussion makes it quite clear that Exception 4 to S. 300 aptly applied. 36 Cr. L. J. 190¹ is a judgment delivered by Young C. J., and Addison J.; in this case no blow whatsoever was given by the deceased and during the course of an altercation the accused who had picked up a skewer-like instrument for breaking ice in his hand thrust it into the stomach of the deceased which ended in death. Exception 4 to S. 300 was held applicable. A. I. R. 1925 Lah. 148² is another ruling of this Court in which where the death was caused with a knife the accused was convicted under S. 304, Part II. It was held that there was no intention to cause death or to cause such injury as was likely to cause death. All that could be said was that the accused gave a stab in the chest knowing that he was likely by that act to cause death. In view of these authorities, I hold that the appellant was rightly convicted under S. 304, Part II, by the learned Additional Sessions Judge, and the case does not fall under S. 302, as contended by the learned counsel for the Crown. The appeal of the Crown is, therefore, dismissed. The result is that the sentence of Hans Raj Singh under S. 304, Part II, Penal Code, to eight years' rigorous imprisonment is upheld.

Teja Singh J. — The facts of this case are given in the judgment of my learned

1. (35) 22 A. I. R. 1935 Lah. 149 : 152 I. C. 860 : 36 Cr. L. J. 190, Abdul Majid v. Emperor.

2. (25) 12 A. I. R. 1925 Lah. 148 : 82 I. C. 361, Khan Mir v. Emperor.

brother and it is unnecessary to recapitulate them again. Briefly speaking the prosecution case was that Ghulam Mohammad deceased went to the shop of Hans Raj Singh appellant to buy *pakor*s. Hans Raj Singh was then busy in drinking with Chanan Singh and Rattan Singh. On Ghulam Mohammad's asking him to give him *pakor*s Hans Raj Singh started abusing him and taunted him that when he had opened a shop in front of his shop why could he not make *pakor*s himself, the allegation being that Ghulam Mohammad had set up his shop in competition with that of Hans Raj Singh and this act of his was resented by the latter. Ghulam Mohammad abused Hans Raj Singh in return and then he was attacked by Hans Raj Singh as well as his companions. Hans Raj Singh was alleged to have picked up a knife and stabbed Ghulam Mohammad in the chest. The man fell down and died on the spot. The prosecution witnesses also alleged that Chanan Singh gave a knife blow to a witness whose name is also Ghulam Mohammad and Rattan Singh attacked one Niamat Ali. Rattan Singh was acquitted by the learned Sessions Judge on the ground that he was not proved to have taken any part in the offence. I concur in the finding of my learned brother that the case was not clear even against Chanan Singh, that his appeal must be accepted and his conviction and sentence be set aside. The evidence against Hans Raj Singh has been discussed by my learned brother and I agree with him in finding that he did attack the deceased with his knife. The question now is whether his conviction under S. 304, Part II, Penal Code, is legal. The learned Sessions Judge, though he did not definitely hold in so many words, appears to be of the view that the case fell within the purview of Exception 4 to S. 300, Penal Code. This is what appears in the last paragraph of his order :

"Hans Raj Singh has undoubtedly committed culpable homicide. He inflicted an injury, with a *chhuri* used for peeling fish on the chest of Ghulam Mohammad deceased, which injury resulted in his immediate death and could not have but done so. The evidence on record, however, does not show that he had any intention to cause the death of Ghulam Mohammad. No motive has been proved. As the occurrence was a sudden one and there was no premeditation on the part of Hans Raj Singh, he must be held to have committed an offence in the heat of passion upon a sudden quarrel. It does not appear that he took any undue advantage or acted in a cruel manner."

After referring to the fact that it was not Hans Raj Singh accused who went to Ghulam Mohammad's shop but it was the latter who

came to the shop of Hans Raj Singh and the fact that only one injury was inflicted by Hans Raj he observed as follows :

"Counsel for the accused argued on the other hand that Hans Raj Singh could not in the circumstances be credited with the knowledge that the *chhuri* was likely to cause death. I do not find any force in this argument also. The *chhuri* for peeling fish is a dangerous weapon and if an injury like the one inflicted in this case is inflicted with it, the accused must be credited with the knowledge that it was likely to cause death. It was held in A.I.R. 1938 Lah. 618³ that where an accused had come up with an iron rod and seizing it with both the hands had struck it on the deceased's head, in consequence of which the deceased had fallen dead, the accused must be credited with the knowledge that the heavy iron rod was likely to cause death and could, therefore, be rightly convicted under Part II of S. 304, Penal Code. Hence I find that Hans Raj Singh inflicted an injury with the knowledge that it is likely to cause death, but that he had done so without any intention to cause death, or to cause such bodily injury as is likely to cause death."

I shall first deal with Exception 4 to S. 300. The words of the exception are :

"Culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel and without the offender's having taken undue advantage or acted in a cruel or unusual manner."

In order that the accused's case should come under this exception it is necessary for him to prove three things: (1) That the offence was committed without premeditation; (2) that it was committed in a sudden fight in the heat of passion upon a sudden quarrel; (3) that he did not take any undue advantage and did not act in a cruel or unusual manner.

If any one of these requirements is not satisfied the Exception can have no application. The position originally taken up by prosecution was that because Hans Raj Singh bore a grudge against the deceased for his having opened a shop just in front of his shop with a view to compete with him, he deliberately attacked him with the intention of causing his death. The evidence, however, does not establish this fact and I entirely concur in the finding of my learned brother that no motive for the crime was established. In fact even the learned counsel for the Crown conceded that the offence was not premeditated and that it occurred on the spur of the moment in the heat of passion and upon a sudden quarrel. He, however, argued that since there had been only an exchange of abuse between the deceased and Hans Raj Singh it cannot be said that there was a sudden fight and consequently the first requirement for the application of the

3. ('38) 25 A. I. R. 1938 Lah. 618 : 177 I. C. 642, Sadhu v. Emperor.

exception was not satisfied. The appellant's counsel on the other hand argued that the word 'fight' in the exception was used in a loose sense and really meant a quarrel. His position was that if two persons suddenly start quarrelling with each other and in the course of the quarrel one of them kills the other, provided that he does not take advantage of his adversary and act in a cruel or unusual manner, in spite of the fact that there was no fight between them in the sense that no blows were exchanged he would be entitled to the benefit of the exception. The term 'fight' is not defined in the Code. According to Murray's Oxford Dictionary it means, a combat, a battle, a hostile encounter or engagement between opposing forces, strife or conflict. Webster gives its meaning as a battle, an engagement, a contest in arms, a combat and a struggle or contest of any kind. It may, therefore, be urged that a mere quarrel or what is generally described as a wordy warfare can also be regarded as a fight, but the fact that the terms 'fight' and 'quarrel' are used in the exception side by side indicates that the intention of the Legislature was that there should be something more than a mere quarrel. The word 'fight' is also used in S. 159, Penal Code, which relates to an affray. This is how the section reads :

"When two or more persons, by fighting in a public place, disturb the public peace, they are said to 'commit an affray.'"

It was held by Thomas J. in A. I. R. 1937 Oudh 425⁴ that the offence of affray as defined in S. 159 postulates the commission of a definite assault or a breach of peace and that mere quarrelling or abusing in a street, without exchange of blows is not sufficient to attract the application of S. 159. In Black's Law Dictionary fight is defined as an encounter, with blows or other personal violence, between two persons. Gour in his Penal Law of India while comparing Exception 4 with Exception 1 observes as follows :

"There is provocation in this case as in the first exception, but the injury done is not the direct consequence of that provocation. In fact, the present exception deals with cases in which, notwithstanding that a blow may have been struck, or some provocation given in the origin of the dispute or in whatever way the quarrel may have originated, yet the subsequent conduct of both parties puts them in respect of guilt upon an equal footing. For a 'sudden fight' implies mutual provocation and blows on each side. The homicide committed is then clearly not traceable to unilateral provocation, nor in such cases could the whole blame be placed on one side, for if it is so

the exception more applicable would then be Exception 1."

No case was cited at the bar nor have I been able to lay my hands on any decided case in which this aspect of Exception 4 to S. 300, which I am considering, was discussed. In A. I. R. 1928 Lah. 93,⁵ a case decided by a Division Bench of this Court consisting of Shadi Lal C. J., and Addison J., it was found that the attack upon the deceased was not premeditated and it was the result of a sudden quarrel, but since there had been no fight, i. e., no blows had been exchanged between both sides, before the deceased was attacked, it was held that Exception 4 did not apply. The observations of the learned Judges on the point read as below :

"It appears that the fatal attack was not a premeditated one and that both the victims were injured in the heat of passion upon a sudden quarrel, and that the offenders did neither take undue advantage or acted in a cruel or unusual manner. The facts of the case, however, make it clear that there was no fight between the offenders on the one side and their victims on the other; and we cannot, therefore, hold that the requirements of Excep. 4 to S. 300, Penal Code, have been established."

In A. I. R. 1928 Lah. 913⁶ decided by Addison and Dalip Singh JJ. too, the offence was not deliberate and was committed suddenly after mutual abuse. The evidence of the principal witness, which was accepted by the Court to be correct, was that the deceased and his wife were going about collecting earthen vessels for the marriage of a Kashmiri in the village. When they passed by the house of Jallu they saw the four accused sitting there. One of the accused asked the deceased what business he had to go past their house. This led to abuse. The accused mentioned above got up, chased her husband and struck him with an axe. Then his companions also joined him and struck the deceased with dangs on the head. While disposing of the contention that the offence did not amount to murder Addison J. with whom Dalip Singh J. concurred made the following remarks :

"There is no doubt of the appellant's guilt. Exception 4 to S. 300, Penal Code, has no application. The only point in the appellant's favour is that the murder was not a deliberate one but occurred suddenly after mutual abuse. The appellant took up on the spur of the moment the weapon and killed the deceased with it. In these circumstances and also because the class to which the parties belong cannot be said to be a turbulent one. I would accept the appeal to the extent of substi-

5. (28) 15 A. I. R. 1928 Lah. 93 : 105 I. C. 678, *Preman v. Emperor*.

6. (28) 15 A. I. R. 1928 Lah. 913: 116 I. C. 187, *Gaman v. Emperor*.

4. (37) 24 A.I.R. 1937 Oudh 425 : 166 I. C. 280, *Jagannath Sah v. Emperor*.

tuting a sentence of transportation for life for the death sentence, that is, I would not confirm the death sentence but would impose the lesser penalty for murder."

It was argued before us that a fight follows as soon as one person beats another. No authority was cited in support of this proposition. My opinion is that if a person gives blow to another, there will be fight only if the other hits him back or at least he gets ready and attempts to assault but none if he keeps quiet and does nothing. In that case it will be only a one-sided attack but not a fight. If blows are exchanged the fact that the person assaulted hits back in self-defence would not make any difference. Reference in this connexion is invited to 53 ALL. 229.⁷ In that case Babu Ram, Bhim Singh and Kali Das were hauled up under s. 160, Penal Code, for having committed an affray. The evidence was that Babu Ram and Bhim Singh dragged Kali Das out of his shop into a public street and gave him a beating. Kali Das defended himself. The trial Court acquitted Kali Das on the ground that he did not take part in the affray, since whatever he did he did in self-defence. It was urged on behalf of Babu Ram and Bhim Singh before the High Court that they too had committed no offence inasmuch as there had been no fight between them and Kali Das. It was held that the conviction of Babu Ram and Bhim Singh under s. 160, Penal Code, was proper inasmuch as there was fighting in a public place, notwithstanding the fact that the third person only defended himself in exercise of his right of private defence. I wish to add that if in the course of a sudden quarrel one of the parties gives a blow to his adversary and that blow results into death he cannot take advantage of Excep. 4, notwithstanding the fact that after he has given the blow he is belaboured by the deceased, before he dies, or by his companions, for the simple reason that at the time he gave the fatal blow there was no fight.

In this case it is not even alleged that Hans Raj Singh was attacked by the deceased or by any one before he picked up the knife and stabbed the deceased. Accordingly there was no application of Excep. 4. I have discussed the applicability of Excep. 4 to s. 300, Penal Code, on the assumption that the act committed by the appellant would otherwise amount to murder. But on consideration of the entire facts and circum-

stances of the case I agree with my learned brother that it does not. There is not the slightest foundation for saying that he attacked the deceased with the intention of causing death. Since there was no previous enmity between them and they had merely exchanged abusive language of very ordinary type, before he gave the blow, I do not believe that he had the intention of causing such bodily injury as he knew to be likely to cause death. The evidence produced by the prosecution goes to show that the knife which the appellant used was lying on the spot and he picked it up from there, possibly without realizing that it could cause a serious injury. It is admitted that the appellant among other things sold fried fish and the knife was used for peeling fish. The wound found on the dead body measured $2\frac{1}{2}" \times 1" \times 4"$. This makes me think that the knife was of an ordinary type. For these reasons, I hold that neither the appellant intended to cause an injury sufficient in the ordinary course of nature to cause death nor he knew that his act was so imminently dangerous that it must in all probability cause death or it would result into an injury likely to cause death. All that can be held is that the injury caused by him was likely to cause death and consequently he was guilty of culpable homicide not amounting to murder.

In 30 P. R. 1902 Cr.⁸ there was a quarrel between the prisoner and his wife who was dilatory in the performance of her duties, exchanged abuse with her, and gave her a blow on the head with a heavy hammer which he picked up on the spur of the moment. She died from the effects of the blow. It was held that the conviction for murder could not be sustained and the offence fell within the ambit of s. 304, Part II, Penal Code. The sentence of seven years' rigorous imprisonment was considered sufficient. In 3 P. L. R. 1914⁹ K. S. was sitting on the *thara* or platform of his house. V. S. came down the lane driving some cattle. One of the bullocks mounted on to the platform and this annoyed K. S. There was an exchange of abusive language and a sudden quarrel in which K. S. struck V. S. on his head with a *chhavi* which he fetched from his house. It was held by Johnstone and Beadon JJ. that though a *chhavi* was used s. 304, Part II, Penal Code, applied and reduced the sentence from

7. ('31) 18 A. I. R. 1931 All. 8 : 53 All. 229 : 134 I. C. 834, Emperor v. Babu Ram.

8. ('02) 30 P. R. 1902 Cr., Rahmat v. Emperor.

9. ('14) 1 A. I. R. 1914 Lah. 151 : 22 I. C. 754 : 3 P. L. R. 1914, Kundan Singh v. Emperor.

transportation for life to ten years' rigorous imprisonment. The facts that weighed with the learned Judges were : (1) that there was no premeditation, (2) that the motive was inadequate for causing death, (3) that the accused did not intend to cause death or to cause such bodily injury as was likely to cause death, (4) that he acted on the spur of the moment in the heat of passion, (5) that he seized the first weapon which came to hand and (6) that only one blow was inflicted. In A. I. R. 1925 ALL 4¹⁰ the accused was convicted under S. 302, Penal Code, for murdering his sister-in-law by striking her on the head with a lump of limestone. The deceased and the wife of the accused were first cousins. They started quarrelling over pumpkin. In the meanwhile the accused arrived and broke the pumpkin into two pieces against the wishes of the deceased and she abused him. On this he struck her with a lump of limestone which weighed about three pounds. It was held that since the accused acted from impulse of moment and had no intention either to kill the deceased or fracture her skull he was guilty only of culpable homicide not amounting to murder and a sentence of two years' rigorous imprisonment was considered sufficient. In A. I. R. 1925 Lah. 148² a sudden fight arose between the accused and the deceased about drawing water at a tap with the result that they abused each other and the accused drew out his knife and stabbed the deceased with it. The knife pierced the chest and cut the heart. The wound ultimately proved fatal and the accused was convicted of culpable homicide not amounting to murder and was sentenced to rigorous imprisonment for ten years. On appeal to this Court it was held by Zafar Ali J. that Part II of S. 304, Penal Code, applied and because of the youthful age of the appellant the sentence was reduced to seven years' rigorous imprisonment. I am, therefore, of the opinion that the conviction of Hans Raj Singh appellant in this case under S. 304, Part. II, Penal Code, was quite proper and the sentence of eight years' rigorous imprisonment awarded to him cannot be regarded as severe. The result is that the Crown appeal must stand dismissed and the other appeal is allowed only to this extent that Chanan Singh's conviction is set aside and it is ordered that he be released forthwith.

V.B.

Order accordingly.

10. (25) 12 A. I. R. 1925 All. 4 : 81 I. C. 320, Ganesha v. Emperor.

[*Case No. 12.*]

A. I. R. (33) 1946 Lahore 47

ABDUR RAHMAN J.

Dr. Lok Nath — Judgment-debtor —
Appellant

v.

Anup Chand — Decree-holder —
Respondent.

Second Appeal No. 1862 of 1944, Decided on 31st October 1945, from order of District Judge, Rawalpindi, D/- 1st November 1945.

Punjab Rent Restriction Act (10 [X] of 1941), S. 10 — Notification by District Magistrate, Rawalpindi, preventing landlords from recovering rent from tenants at rate higher than is payable under the Act — Notification does not apply to tenancy determined before issue of notification.

A notification by the District Magistrate, Rawalpindi, issued on 6th August 1943, preventing the landlords from recovering rent from the tenants at a rate higher than that payable under the Punjab Rent Restriction Act of 1941, is only applicable to persons who are tenants and cannot apply to persons whose tenancy has been determined on the expiry of a valid notice under S. 10, Punjab Rent Restriction Act, before the notification was passed. It is not retrospective in operation. A decree for ejectment passed before the issue of that order is executable. The fact that the tenant continued to occupy the premises even after the tenancy had been determined under the agreement giving him grace period to vacate the premises, is beside the point: Execution Second Appeal No. 621 of 1944 (Lah.), *Rel. on.* [P 48 C 1, 2]

J. L. Kapur and D. K. Mahajan —
for Appellant.

S. L. Puri — for Respondent.

Judgment.—A decree for ejectment was passed in favour of the respondent on the basis of a compromise which was arrived at between the parties on 21st June 1943. It appears, however, that before the suit for ejectment was brought the respondent had served the appellant with a notice for six months. This fact was admitted by learned counsel for the appellant before me. The decree under the compromise was not to be executed for six months. Before the six months expired a notification by the District Magistrate, Rawalpindi, was issued on 6th August 1943. It has not been placed on the record, but learned counsel for the appellant has furnished me with a copy. It reads as follows:

"that no landlord or other person entitled for the time being to recover rent from the tenants of any such accommodation, shall, directly or indirectly, require the tenant or sub-tenant to pay rent at a rate higher than that which was payable under the provisions of the Rent Restriction Act of 1941."

An application for recovery of possession of the property was presented on behalf of the decree-holder, subsequently. He was met

with the reply that, in view of the District Magistrate's notification the judgment-debtor was not liable to be dispossessed. The notification was challenged in the beginning on behalf of the decree-holder on the ground of its being *ultra vires* but the plea was given up and the matter was not gone into. The decree-holder had also alleged that the order of the District Magistrate had no application, as the relationship of landlord and tenant had ceased to subsist after the tenancy had been determined by the decree-holder. It was also urged that the order not being retrospective in operation, it could have no effect on the decree which had been passed before the notification. A number of other points were also urged, but it is unnecessary to refer to them. The execution Court held that, in view of the order of the District Magistrate, it could not execute the decree and deliver possession of the property to the decree-holder. On appeal, however, the District Judge, Rawalpindi, held, following a decision of a learned Single Judge of this Court in Execution Second Appeal No. 621 of 1944, that the District Magistrate's order could not be held to be retrospective and the decree, which had been passed before the issue of that order, was executable. The appeal was accordingly allowed and the application for execution was sent back for being proceeded with. Aggrieved by this order the judgment-debtor has preferred a second appeal.

The order of the District Magistrate, as I read it, only applies to persons who are tenants and can have no application to persons whose tenancy had been determined before the order was passed. The tenancy had been determined in the present case on the expiry of a valid notice of ejectment which had been served on the appellant before the institution of the suit. It may be observed here that the appellant was asked to vacate within six months of the service of the notice and the provisions of S. 10, Rent Restriction Act, 1941, had thus been complied with. The fact that the appellant continued to occupy the premises even after the tenancy had been determined is beside the point. It was not possible for the decree-holder to oust the appellant without the intervention of Courts and this he has been seeking all along. But the defendant-appellant adopted all possible tactics to prolong the litigation. Realising that the litigation could be dragged on indefinitely, the respondent agreed to give to the appellant a further period of six months for vacating the property and the case

was compromised. That should not, however, be taken to mean that the respondent had agreed to accept the appellant as a tenant. There is nothing on the record to suggest that a fresh tenancy had come into being. The fact that the appellant was liable to pay for his use and occupation would not make him a tenant. I must, therefore, hold that the appellant was not a tenant on the date on which the District Magistrate's notification was issued and if he was not a tenant on that date, the notification could not be applied to him. It is not retrospective in character. I must, for the above reasons, affirm the decision of the lower appellate Court and dismiss the appeal with costs.

V.B.

Appeal dismissed.

[Case No. 13.]

A. I. R. (33) 1946 Lahore 48**TEJA SINGH AND MOHAMMAD SHARIF JJ.***Parita — Appellant*

v.

Emperor.

Criminal Appeal No. 667 of 1945, Decided on 13th November 1945, from order of Sessions Judge, Karnal, D/- 11th June 1945.

(a) Criminal P. C. (1898), S. 288—Deposition admitted under, is substantive evidence.

The previous statements of a witness admitted under S. 288 is substantive evidence in the case.

[P 49 C 1, 2]

Cr. P. C. —

('41) Chitaley, S. 288, N. 7, Pt. (1).

('41) Mitra, Page 994, N. 898.

(b) Criminal trial — Evidence — Witness—
Witness resiling from his previous statement
— Court cannot act upon his statement unless corroborated.

In a criminal trial, the mere fact that a witness resiles from his previous statement and completely exonerates the accused in the statement made by him at the trial, makes it incumbent upon the Court not to act upon his evidence unless it is corroborated by any other independent evidence.

[P 49 C 2]

(c) Criminal trial — Evidence — Suspicion
cannot take place of positive evidence.

A was charged for the murder of B. Strychnine in sufficient quantity was found in the *post mortem* in B's stomach. People in the village suspected that A was carrying on an intrigue with B's wife:

Held that evidence only showed that possibly A had some hand in the poisoning of B but it was only a suspicion and suspicion could not take the place of positive evidence. Case against A was therefore not proved.

[P 50 C 1]

Sri Ram Luthra — for Appellant.

A. G. Maurice and H. R. Mahajan (for Advocate General) — for the Crown.

Teja Singh J. — This is an appeal by Parita from an order of the Sessions Judge,

Rohtak, convicting him under S. 302, Penal Code, of the murder of his own nephew Bhoja and sentencing him to death. There is also before us a reference by the learned Judge of the Court below for the confirmation of the death sentence. Bhoja died on the night of 14th March 1945 under suspicious circumstances. Naurang Lambardar of the village had seen him in the evening and when he came to know of his death he went to the deceased's house and made enquiries as regards the circumstances under which the death had taken place. He kept a watch over the dead body and detained the appellant. On the following morning he went to the police-station and made a report wherein he stated that there was illicit intimacy between Bhoja's wife and the appellant and that Bhoja had died all of a sudden. The police arrived and sent Bhoja's dead body for *post mortem* examination. It was on the receipt of the medical report that the case under S. 302, Penal Code, was registered. It is in evidence that the deceased was employed at Delhi and during his absence the appellant lived with his wife in the same house. On his return to the village Bhoja came to learn that the appellant and his wife had been carrying on an intrigue. Accordingly he got annoyed with the appellant, turned him out of his house and gave him a shed, which was not very far from the house, to live in. On the fateful evening Bhoja came back from the fields and complained of pain in the abdomen. His wife gave him some drug but when it did not do any good to him she sent for the appellant for help and advice. The prosecution maintains that the appellant gave some strychnine to the deceased's wife, Mt. Kishni, and assured her it was a very effective medicine for abdominal pain. Mt. Kishni mixed the medicine that the appellant had given to her with the powdered drug that she had already with her and administered it to the deceased. The result was that the deceased died in a couple of hours.

The principal witnesses in the case were Mt. Kishni, her son Daya Nand, Dip Chand and Babar. Mt. Kishni and Daya Nand in their evidence at the trial completely denied that anything had been given by the appellant to her to be administered to the deceased. In fact, they deposed that the appellant came to their house after Bhoja's death. However, their statements in the Committing Magistrate's Court which were transferred to the Sessions record under S. 288, Criminal P. C., and are, therefore,

substantive evidence in the case, were quite different. In those statements they both averred that Bhoja died because of the medicine that the appellant had given to Mt. Kishni to be administered to the deceased. They also corroborated the prosecution version in other respects. The explanation that they both gave regarding what they stated in the Committing Magistrate's Court was that they were under the pressure of the police. Mt. Kishni also added that she was kept standing by the Sub-Inspector and was warned that unless she made a favourable statement she would be hanged or disgraced. It is correct that there is no direct evidence in support of what the witnesses stated regarding the police pressure or threats, but the mere fact that they resiled from their previous statements and completely exonerated the appellant in their statements at the trial would make it incumbent upon us not to act upon their evidence unless it is corroborated by any other independent evidence. Such evidence, we are told, is forthcoming in the statements of Dip Chand and Babar, but a careful perusal of those statements would make us think that neither of them can be implicitly relied upon. Dip Chand admitted in cross-examination that he was at the house of the deceased when the lambardar arrived and that he even met Babar, who according to him was present at the time the appellant gave strychnine to Mt. Kishni and the latter gave it to her husband, but in spite of this he did not talk to either of them on the point. Babar's position was almost the same as that of Dip Chand. In addition, it might be mentioned that there was no occasion for him to go to the house of the deceased at the critical time, inasmuch as he admitted that he was not on visiting terms with them. We are, therefore, of the opinion that both these witnesses were got-up witnesses and their evidence must be entirely rejected.

The other witness who according to the prosecution supported their case was Niranjana (P. W. 11), a druggist of Sonapat. He deposed that on some day between 9th and 11th March last the appellant went to his shop and bought from him six *mashas* of strychnine for Rs. 6. He said that he once held a licence for the sale of poisonous drugs but the term of the licence expired several years ago. In spite of this he kept a bottle of strychnine with him. When asked why he did so he at first said that he did not know that he could not keep strychnine without licence, but later on he coined

another explanation, i. e., that he required strychnine for his own use, because he was suffering from rheumatic pains and was using the drug as a medicine. He said that he made pills consisting of strychnine and ten other drugs but he had to admit that no such pill was in his possession at the time he gave evidence in Court. All this makes us think that his evidence could not be true and he had been merely got hold of to drop up the prosecution case.

This leaves us with only two facts: one, that strychnine in sufficient quantity was found in the contents of the stomach of the deceased that were sent to the Chemical Examiner by the Assistant Surgeon who conducted the *post mortem* examination on the dead body and secondly, that people in the village suspected that the appellant was carrying on an intrigue with Mt. Kishni. This would only go to show that possibly the appellant had some hand in the poisoning of the deceased, but after all it only amounts to a suspicion and suspicion cannot in any case take the place of positive evidence. We may here point out that all the four assessors who assisted the learned Sessions Judge at the trial were of opinion that the case against the appellant was not proved. We are inclined to think that the assessors' opinion was well-founded and the appellant could not be convicted of murder on the strength of the prosecution evidence. Accordingly we accept the appeal, set aside the appellant's conviction and sentence and direct that he be released forthwith. The sentence of death is not confirmed.

V.B.

Conviction set aside.

[Case No. 14.]

A. I. R. (33) 1946 Lahore 50

ABDUL RASHID AND KHOSLA JJ.

*Mrs. Constance Zena Wells —**Plaintiff — Appellant*

v.

Governor-General of India in Council — Respondent.

First Appeal No. 39 of 1942, Decided on 18th May 1945, from decree of Addl. Sub-Judge, First Class, Lahore, D/- 5th July 1940.

(a) Employers' Liability Act (1938), S. 3(d)—Words "in the normal performance of his duties" in S. 3(d) relate to negligence of workman causing injury to another workman.

An engine driver on a government railway driving negligently caused an accident resulting in personal injury to and subsequent death of a fireman working on the same engine:

Held that the words "in the normal performance of his duties" in S. 3 (d) relate to the work-

man whose negligence has led to the accident which has resulted in personal injury to another workman. Section 3 (d) of the said Act and not the doctrine of common employment, therefore, is applicable. [P 52 C 2]

(b) Torts — Incapacity to be sued—Liability of Crown for damages — Sovereign activity of the Crown distinguished from commercial functions necessary for compensation.

The sovereign activity of the Crown stands on an absolutely different footing from the commercial functions undertaken by the Crown. The State Railway is a commercial organization standing on the same footing as any other organization of carriers. In respect of the commercial activities of the Crown, no special privilege can be claimed so far as suits for damages are concerned and hence no specific enactment making the Crown specifically responsible for damages is necessary. [P 53 C 1]

(c) Torts — Damages — Ascertainment of liability under Employers' Liability Act (1938)—Income equivalent to pecuniary loss sustained—Period of twenty years from time of death of workman regarded suitable for calculating damages, if death takes place between 20 and 26 years of age.

The underlying principle in ascertaining compensation for damages under the Employers' Liability Act in case of death of a workman is that the dependents of the deceased must be awarded damages equivalent to the pecuniary loss sustained by them by reason of the death of the workman. The compensation received by the dependents of the deceased workman should be approximately equal to his earnings for a period of twenty years after certain deductions have been made if the deceased workman at the time of the accident is between 20 and 26 years of age: ('38) 25 A.I.R. 1938 Cal. 104 and ('36) 23 A.I.R. 1936 Lah. 362, *Rel. on.* [P 53 C 2]

[Calculation of the amount of damages and deduction therefrom indicated.]

Dr. Mohammad Alam and Qamar-ud-Din —
for Appellant.

*B. K. Khanna, Advocate-General and S. M. Sikri —*for Respondent.

Abdul Rashid J.—This appeal has arisen out of an action brought by Mrs. Wells, for her own benefit and for the benefit of her two children, against the Governor-General of India in Council for recovery of Rupees 1,42,182 as damages under the Fatal Accidents Act (18 [XIII] of 1855). The trial Court has dismissed the suit and the plaintiff has preferred an appeal to this Court.

Mr. Duncan Wells was a fireman in the North-Western Railway and was employed at Rohri. On 10th December 1937, he was working as a fireman on the 7-Up Mail running from Rohri to Samasatta. The train was being driven by Mr. Burke at about 7-25 A.M. on 10th December when it collided with a goods train as a result of which Mr. Wells sustained serious injuries. The collision was due to the negligence of Mr. Burke who drove the train 7-Up into the station at Mirpur Mathelo in spite of the

fact that the signals were against him. Medical assistance was rendered to Mr. Wells the same evening and ultimately his leg had to be amputated. On 14th December 1937, Mr. Wells died in the hospital. The plaintiff was offered Rs. 4000 as compensation under the Workmen's Compensation Act. She refused to receive the compensation and instituted the present suit for recovery of Rupees 1,42,182. The principal allegations in the plaint were that Mr. Wells was drawing a sum of Rs. 80 per mensem as his salary at the time of his death and that he used to earn a sum of about Rs. 160 per mensem as overtime pay. With the plaint a schedule was attached, showing that the salary of Mr. Wells would have risen from Rs. 80 per mensem to Rs. 180 per mensem between the years 1938 and 1948 and that thereafter it would have continued at Rs. 180 per mensem till the year 1965. The amount of overtime pay shown in the schedule attached to the plaint was also on a progressive scale.

It was pleaded on behalf of the defendant, *inter alia*, that the accident in which Mr. Wells lost his life was due to the negligence of Mr. Burke, who was the driver of the engine on which Mr. Wells was working. As Mr. Wells lost his life owing to the negligence of his collaborator on the same railway engine, the doctrine of common employment was available to the defendant, and as a result of that doctrine the plaintiff was not entitled to any damages. It was further pleaded that the claim of the plaintiff was barred as Mr. Wells knew very well what risks attached to the profession of a fireman and he willingly undertook to serve and, therefore, the claim was barred by the doctrine of assumed risk. The correctness of the schedule attached to the plaint was also denied. On these pleadings, the trial Court framed the following issues:

(1) Whether the plaintiff Mrs. Wells is the widow and the other plaintiffs are the children of the deceased and, therefore, have *locus standi* to bring the suit?

(2) Whether the accident mentioned in para. 5 of the plaint was caused on account of the negligence of the defendant's servants?

(3) Whether the deceased was a collaborator of the driver of 7-Up and according to the doctrine of common employment, the plaintiffs have no cause of action against the defendant?

(4) Whether the plaintiffs' claim is barred by the doctrine of assumed risk?

(5) Whether the defendant is not liable for the tortuous acts of his servants and the proper remedy is against the defendant's servants who are found guilty of negligence?

(6) Whether the death of Mr. Wells was due to the accident?

(7) Whether proper medical aid was rendered to the deceased by the defendant with all possible speed?

(8) If issue 7 is not proved, what is the effect on the present case?

(9) Whether the plaintiffs are entitled to any damages? If so, how much?

(10) Whether this Court has no jurisdiction to try this suit and whether this plea can be raised when it has already been decided by this Court against the defendant?

It was held by the trial Court, by some process of reasoning which is incomprehensible to me, that the defence of common employment could be successfully invoked by the defendant and that as the accident was due to the negligence of Mr. Burke, no damages could be claimed for the death of Mr. Wells as he was travelling on the same engine with Mr. Burke. It was held that cl. (d) of S. 3, Employers' Liability Act, was inapplicable as this Act had been framed exactly on the same lines as the English Employers' Liability Act, 1880, and under that Act the dependents of Mr. Wells were not entitled to any damages. In conclusion, it was held by the trial Court that if damages were claimable by the plaintiff in respect of the death of her husband, she should be paid Rs. 8000 and each of her two children should be paid a sum of Rs. 7000. In view of the findings of the Court on issues 3 and 5, the plaintiff's suit was dismissed, and she has, as already mentioned, preferred an appeal to this Court.

The first important question for determination in this appeal is whether the provisions of the Employers' Liability Act, 1938, are applicable to the facts of the present case. If the case is governed by the Employers' Liability Act, 1938, the defendant cannot invoke the aid of the defence of common employment. If, on the other hand the present case does not fall within the purview of the Employers' Liability Act, then the defence of common employment would be available to the defendant. The relevant portion of S. 3, Employers' Liability Act, is in the following terms:

"3. Where personal injury is caused to a workman

(d) by reason of any act or omission of any person in the service of the employer done or made in obedience to any rule or bye-law of the employer or in obedience to particular instructions given by any person to whom the employer has delegated authority in that behalf or in the normal performance of his duties;

a suit for damages in respect of the injury instituted by the workman or by any person entitled in case of his death shall not fail by reason only of the fact that the workman was at the time of the injury a workman of, or in the service of, or engaged in the work of, the employer.

Before this Act was passed, it was open to an employer to plead that the injury to a workman was the result of the negligence of a co-employee and that the deceased workman's dependents were not, therefore, entitled to any compensation or damages. This defence, which was available to the employer, was taken away in England by the Workmen Employers' Liability Act, 1880. The defence of common employment was, however, available to the employer in India until the passing of the Employers' Liability Act, 1938. Now, the defence of common employment has been taken away in certain cases and the only question for consideration is whether this is one of those cases where the defence of common employment cannot be invoked by the defendant. Clause (d) of S. 3 lays down that if the death of a workman is due to any act or omission of a person in the service of the employer done or made (1) in obedience to any rule or bye-law of the employer or (2) in obedience to particular instructions given by any person to whom the employer has delegated authority in that behalf or (3) in the normal performance of his duties, a suit for damages is competent and such suit cannot fail by reason only of the fact that the workman at the time of the injury is a workman of, or in the service of, or engaged in the work of the employer. It goes without saying that when Mr. Wells was travelling in the engine driven by Mr. Burke, the latter was working in the normal performance of his duties. The case is, therefore, in my opinion fully covered by the third part of cl. (d) of S. 3, Employers' Liability Act. The learned Advocate-General contended on behalf of the respondent that cl. (d) of S. 3 does not deal with three sets of circumstances, but only, relates to two contingencies, that is, when the co-employee is doing the work of the employer in obedience to any rule or bye-law of the employer or working in obedience to particular instructions given by the employer or any person to whom that employer has delegated authority in this behalf. The learned counsel contended that the second contingency arises where a person with delegated authority is giving orders to the employee and those orders are given by the person to whom authority has been delegated in the normal performance of his duties. In other words, the words "normal performance of his duties" govern the words "to whom the employer has delegated authority in that behalf" and they do not apply to the co-

employee who is carrying out his duties. In my opinion, this contention is wholly devoid of force. If cl. (d) of S. 3 was meant to relate only to two contingencies the words "or in the normal performance of his duties" were entirely unnecessary. The second contingency had already been covered by the wording of this clause ending with the words "in this behalf." I am of the opinion that the words "or in the normal performance of his duties" relate to the workman whose negligence has led to the accident which has resulted in personal injury to another workman. Mr. Burke in the present case was driving the engine in the normal performance of his duties. The normal performance of his duties resulted in an accident which gave rise to the injuries which were suffered by Mr. Wells and these injuries led to a fatal result.

The argument advanced by the learned counsel for the respondent was not the argument on which the trial Court based its decision. It is, therefore, necessary to examine the reasons on which the trial Court's judgment is based. The trial Court has given an incomplete quotation of S. 1, English Employers' Liability Act, 1880. The trial Court had emphasized the first four clauses of S. 1 but has failed to notice cl. (5), which is in the following terms :

"1. Where personal injury is caused to a workman

(5) By reason of the negligence of any person in the service of the employer who has the charge or control of any signal, points, locomotive engine, or train upon a railway, the workman, or in case the injury results in death, the legal personal representatives of the workman, ... shall have the same right of compensation and remedies against the employer as if the workman had not been a workman of nor in the service of the employer, nor engaged in his work."

It is obvious from sub-s. (5) of S. 1 that the defence of common employment could not be invoked by the employer even under the English Act when the co-employee was in charge of a locomotive engine. In this case, the co-employee, that is, Mr. Burke, was in charge of the locomotive engine. The defence of common employment was not, therefore, available to the defendant in respect of the accident caused to Mr. Wells, who was an employee on the same engine as Mr. Burke. The next point taken up by the learned Advocate-General was that the North-Western Railway was a State Railway and therefore the Crown was the real defendant in the present case. The learned counsel urged that unless the Crown is made specifically responsible for damages by means of an enactment, no damages can

be claimed against the Crown, and that in consequence the defence of common employment has not been taken away in the cases of railways which belong to the Crown. I cannot agree with the argument put forward by the learned Advocate-General. The sovereign activities of the Crown stand on an absolutely different footing from the commercial functions which the Crown undertakes. The North-Western Railway is a commercial organisation standing on the same footing as any other organisation of carriers. In respect of the commercial activities of the Crown, no privilege can be claimed so far as suits for damages are concerned. The North-Western Railway organisation in this respect is liable in the same manner as any other organisation run by private enterprise. The provisions of the Employers' Liability Act, 1938, will, therefore, govern the parties in the present litigation.

The only other question for determination is the amount of damages that should be awarded to the plaintiff. At the time of his death Mr. Wells was about 26 years of age. He was in good health and it is in evidence that he would have normally become a Shunter and then a driver third class and that he would have been drawing a pay of Rs. 180 per mensem at the time of his retirement in the year 1965. This is clearly stated in the evidence of the Divisional Superintendent. So far as the salary of Mr. Wells is concerned, the schedule attached to the plaint is corroborated by other evidence produced on behalf of the defendant. The question of overtime pay, however, presents some difficulty. In all likelihood, the schedule attached to the plaint represents the figures correctly but this schedule has not been corroborated by definite and precise evidence in respect of overtime pay. The only evidence on the record is that in the 12 months preceding the accident Mr. Wells earned Rs. 1723 as overtime pay. As the salary of Mr. Wells increases, the overtime pay would also increase; but, as mentioned already, no precise data has been placed before the Court in this respect. We, therefore, take the overtime pay of Mr. Wells as Rs. 150 per mensem and we are unable to make any allowance for the enhancement in the overtime pay.

The plaintiff has claimed the entire salary and overtime pay of her husband till the age of 55 when he would have retired. On the other hand, a large number of rulings have been quoted before us showing that no gene-

ral rule can be followed in this respect. The underlying principle is that the dependents of a deceased workman must be awarded damages equivalent to the pecuniary loss that they have sustained by the death of the workman. The damages should be calculated in such a manner as to place the dependents in such pecuniary circumstances as if the deceased workman were still alive. It is unnecessary to consider all the cases quoted at the Bar. In several of these cases, such as A. I. R. 1938 Cal. 104¹ and A. I. R. 1936 Lah. 262,² a period of about 20 years was regarded as a suitable period when the workman at the time of the accident was 20 to 26 years of age. The deceased in the present case was 26 years of age and was in robust health. I am, therefore, of the opinion that his dependents should receive compensation amounting approximately to his earnings for a period of 20 years after certain deductions have been made. The salary of Mr. Wells for 20 years from the date of the accident would amount to Rs. 37,920. His overtime pay at the rate of Rs. 150 a month would amount to Rs. 36,000. This makes a total of Rs. 73,920. Mr. Wells could, however, not live for 20 years without spending any money on himself. He had to be on tour for several days in the month and I am of opinion that it would be fair to assume that out of his total earnings of Rs. 73,920 during the period of 20 years he would be spending one-third of the amount on himself and the remaining two-thirds on his wife and two children. A sum of Rs. 24,640 should therefore be deducted from Rs. 73,920, leaving an amount of Rs. 49,280. This amount would be payable to the dependents of Mr. Wells during the period of 20 years, that is, they would be receiving a little over Rs. 200 a month for a period of 20 years from the date of the accident. In other words, they are entitled to an annuity of a little over Rs. 200 a month for a period of 20 years. A deduction must, therefore, be made when the entire amount is being paid to them in a lump-sum about seven years after the accident has taken place. A sum of Rs. 36,000 would be sufficient to provide an annuity of a little over Rs. 200 per mensem, for a period of 20 years. This amount would be divisible between the plaintiff and her two children in three equal shares.

1. ('38) 25 A. I. R. 1938 Cal. 104 : I. L. R. (1938) 1 Cal. 216 : 176 I. C. 719, P. & J. Brocklebank, Ltd., Calcutta v. Noor Ahmode.
2. ('36) 23 A. I. R. 1936 Lah. 362 : 162 I. C. 336, Koshalia v. Riazuddin.

The lower Court had proposed an amount of Rs.22,000. I am of the opinion that this amount should be enhanced by another Rs. 14,000. The learned Advocate-General contended that Mr. Wells had already received a sum of Rs. 17,000 as gratuity, provident fund, and in respect of insurance policies of the deceased and that this should be deducted from the sum of Rs. 36,000. In my opinion, this contention cannot be given effect to. The gratuity and the provident fund of Mr. Wells represent his savings. So far as the money in respect of insurance policies is concerned, the only deduction that could be made would be the amount of premia that was payable by Mr. Wells. No evidence has been brought on the present record to establish as to what premia were payable by Mr. Wells and for how many years. For the reasons given above, I would accept this appeal, set aside the judgment and the decree of the trial Court and grant the plaintiff a decree for a sum of Rs. 36,000. This money will be held to be the property of the plaintiff and her two children in three equal shares. The Railway Department offered only a sum of Rs. 4000 to Mrs. Wells. She was, therefore, compelled to embark on the present litigation in *forma pauperis*. In these circumstances, I am of the opinion that the court-fee payable in this litigation, which will be levied on the sum of Rs. 36,000 will be paid by the defendant. The plaintiff will be entitled to her proportionate costs in both Courts.

Khosla J. — I agree.

G.N.

Appeal accepted.

[Case No. 15.]

A. I. R. (33) 1946 Lahore 54
FULL BENCH

DIN MOHAMMAD, RAM LALL
AND MAHAJAN JJ.

L. Uttam Chand and others
Petitioners

v.

Emperor.

Criminal Revn. No. 195 of 1945, Decided on 17th October 1945, from order of Sessions Judge, Rawalpindi, D/- 2nd January 1945.

(a) Hoarding and Profiteering Prevention Ordinance (35 [XXXV] of 1943, as it stood before amendment by Ordinance 53 [LIII] of 1944), Ss. 3 and 9 — No maximum quantity fixed under S. 3 (1) (b) in respect of article—Refusal to sell article is not punishable.

The refusal to sell an article, in respect of which the Central Government has not fixed under S. 3 (1) (b) the maximum quantity which may in any one transaction be sold to any person, is not punish-

able under the Ordinance: Crim. Appeal No. 1131 of 1944, *Approved*. [P 56 C 2]

(b) Hoarding and Profiteering Prevention Ordinance (35 [XXXV] of 1943), Ss. 13 and 9 — Confiscation of article under S. 13—Extent of.

On conviction for refusal to sell an article, the whole quantity of that article in the possession of the accused can be confiscated and not merely the quantity asked for and refused. [P 56 C 2; P 57 C 1]

(c) Interpretation of statutes — Literal construction—Meaning of words plain — Speculation as to possible intention of Legislature is not permissible.

The Courts will generally lean in favour of a literal construction of words employed by the Legislature. The Legislature means what it says and where the meaning is plain, it is not permissible to speculate about the possible intention. [P 55 C 2]

C. P. C. —

(44) Chitaley, Preamble, N. 7, pts. 2 and 11.

(41) Mulla, page 2, pts. (b) and (c).

(d) Interpretation of statutes—Penal statute — Two interpretations possible — Interpretation favourable to subject should be adopted.

It is a cardinal principle of construction that where two interpretations are possible on the language of a penal enactment such as the Hoarding and Profiteering Prevention Ordinance, 35 [XXXV] of 1943, the interpretation in favour of the subject must be adopted. In a state of doubt regarding the meaning and the intention of the Legislature the subject is entitled to that construction which is favourable to him. [P 56 C 1]

C. P. C. —

(44) Chitaley, Preamble, N. 7, Pts. 26, 44.

M. Sleem and S. M. Sikree — for Petitioners.

Basant Krishan Khanna, Advocate-General
and B. N. Malhotra, Public Prosecutor —
for the Crown.

Ram Lall J.—The brief facts on which these questions have arisen are that a customer went into a shop and asked for certain kinds of cloth known as Boski and Lady Hamilton. He was told that the cloth asked for was not in stock. This representation was made by the servants of the owner of the shop and turned out to be untrue. The shop was raided and certain pieces of the cloth which the dealer had refused to sell were recovered and taken into possession. The dealer was prosecuted under the Hoarding and Profiteering Ordinance, 35 [XXXV] of 1943, and sentenced. It was also ordered that the cloth recovered in the raid be confiscated.

In a revision petition to the High Court it was contended that the refusal to sell was by a servant of the proprietor of the shop and the proprietor could not be held responsible for the act of his servant; secondly, that the Central Government had not fixed any maximum quantity in respect of the articles in question and therefore the refusal to sell was not punishable; and, thirdly, that the order confiscating the whole of the quantity stocked of the kind of cloth asked for was

illegal. The first question was referred to a Full Bench* and it was held that the master was liable for the acts of his servant for the purposes of this Ordinance. The other two questions have now been referred to a Full Bench. These questions are :

(i) Whether the refusal to sell an article in respect of which the Central Government has not fixed a maximum quantity under S. 3 (1) (b) of the Hoarding and Profiteering Ordinance is punishable under that Ordinance; and

(ii) Whether on conviction for refusal to sell an article, the Court can order the confiscation of the whole quantity of the article in the possession of the accused or only the quantity asked for and refused?

An answer to both questions involves the interpretation and true meaning of Ss. 3, 9 and 13 of the Ordinance. It is desirable to set forth in brief the various relevant sections of the Ordinance to indicate the background of these sections. The preamble states that the object of the Ordinance is to prevent the mischief of hoarding and profiteering. Section 3 provides for the fixing of maximum quantities and S. 3 (1) (b) enacts that the Central Government may, by notification, fix in respect of any article, "the maximum quantity which may in any one transaction be sold to any person," and S. 3 (2) provides for the fixation of quantities and prices or rates for different articles for different localities or for different classes of dealers. Section 4 deals with restrictions on possession by dealers where a maximum is fixed under S. 3 and provides, *inter alia*, that no one shall sell or offer for sale to any person in any one transaction a quantity of an article in excess of the maximum fixed by notification under S. 3 (1) (b). Section 5 deals with restrictions on possession by dealers when no maximum has been fixed under S. 3. It may be noticed that the restriction is only as to price and quantity to be possessed and not as to quantity to be sold. Section 6 provides restrictions on price where no maximum has been fixed and Ss. 7 and 8 deal with general limitations on quantities to be possessed by the public and the duty to declare excess stock. Section 9 is an important provision dealing with refusal to sell and is in the following terms :

"9. No dealer shall, unless previously authorised to do so by . . . without sufficient cause refuse to sell to any person any articles within the limits as to quantity imposed by this Ordinance."

By a later Ordinance the words "if any" were inserted between the words "the limits" and the words "as to quantity," but with this amendment we are not directly concerned. Section 10 deals with the duty of

dealers to give cash memoranda in the case of certain sales and S. 11 provides for the liability of dealers to mark and exhibit prices of articles exposed or intended for sale. Section 12 deals with the powers of inspectors and others and S. 13 deals with penalties. Sub-section (3) of S. 13 is in the following words :

"A Court convicting any person of an offence punishable under this Ordinance may order any article in respect of which the offence was committed to be forfeited to His Majesty."

The remaining sections are not material for the present discussion. A perusal of these sections indicates *prima facie* that the refusal to sell contemplated by S. 9 is only with reference to an article in respect of which a maximum has been fixed under S. 3. When the offence charged is refusal to sell and that refusal can only refer to an article contemplated by S. 3, it follows that the refusal to sell any other article is not within the penal provisions of the Ordinance. This conclusion appears to be the result of a literal construction of the words employed by the Legislature and Courts will generally lean in favour of such a construction. The Legislature means what it says and where the meaning is plain, it is not permissible to speculate about the possible intention. It has been contended by the learned Advocate-General that the literal construction in the above sense would render the Act ineffective. It was urged that the object of the enactment would be entirely defeated if this method of construction was adopted inasmuch as the object of the Ordinance was to regulate trade generally and as there are a large variety of goods to which the Ordinance applies, it is impossible for the Central Government to make lists of all such articles and specify the maximum limits of quantity to be sold at any one time. It must be remembered, however, that dealers are expected by this very Ordinance to exhibit lists with prices marked of all goods offered by them for sale and I can see no difficulty in classifying from time to time such goods as are likely to be the subject of hoarding and profiteering. Even if this were not so, it is possible to argue that the omission was deliberate and it was contemplated that as difficulties were experienced regarding any particular class of goods they would become the subject of notification under S. 3 and maxima fixed as contemplated by that section. Till such time arrived, it could be argued that the refusal to sell such goods was not intended to be penal. In this view

* See ('45) 32 A.I.R. 1945 Lah. 238 (F.B.).

of the matter, there does not appear to be any obscurity in the language of the enactment which required to be cured for the purposes of saving the enactment itself.

So far as the object of the enactment is concerned, it is always a matter of conjecture when the object is not specified. The specified object appears to be to prevent the mischief of hoarding. Where refusal to sell is made penal where no maximum quantity is fixed, it would be open to a person to purchase the whole stock of an article in the possession of dealers in certain articles and, if this were so, the mischief of hoarding and profiteering would be encouraged rather than otherwise. In any event on the one side it may be urged that a literal construction will nullify to some extent the purposes of the Act and therefore such a construction should be avoided. On the other, it may be urged, firstly, that the professed object of the Act would be defeated if the literal construction was departed from and, secondly, that an obviously penal enactment must be construed in favour of the subject. It is a cardinal principle of construction that where two interpretations are possible on the language of an enactment, in construing a penal enactment, the interpretation in favour of the subject must be adopted. That there was some ambiguity is evidenced by the fact that the words "if any" were added in S. 9 by an amending Ordinance 53 [LIII] of 1944. Whether the addition of these words has removed the obscurity is a matter on which grave doubts can still be entertained, but the existence of the obscurity seems to have been recognised. In this aspect, the matter is one of doubt regarding the meaning and the intention of the Legislature and in a state of doubt, the subject is entitled to the more favourable construction. An almost identical question came up for decision before a Division Bench of this Court in Criminal Appeal No. 1131 of 1944¹ and Din Mohammad J. in delivering the judgment of the Bench observed :

"Moreover, even if it were possible to hold that the provision was also susceptible of the interpretation sought to be put upon it on behalf of the Crown, no conviction can be recorded against the respondent, inasmuch as this being a criminal enactment, it must, in the first instance, be given an interpretation which is most favourable to an accused person."

It appears to me that the case for the Crown cannot be put on a higher footing than the case stated in the passage quoted above. I

am in respectful agreement with the view of the law so stated and therefore would answer the reference by saying that where no maximum quantity has been fixed under S. 3 of the Ordinance, a refusal to sell such an article is not punishable. So far as the second question referred to the Full Bench is concerned, its decision in view of the answer to the first question becomes purely academic. As the question has been referred, I am of the opinion that what is liable to be confiscated is the whole quantity of that article in stock with the dealer and not merely the quantity asked for and refused. In many cases, as in the case out of which this reference has arisen, there was a refusal to sell before the customer could specify the quantity required. Quantities required are usually small, and the confiscation of only the quantity required would not operate as a punishment at all. To adopt this construction would render the provision wholly ineffective. If only the quantity required was intended to be the subject of confiscation on conviction, there was no difficulty in stating so.

On general principles too, it appears to me that the article means the whole of the articles stocked. The customer does not specify out of which particular stock the quantity required should be sold to him. If there are several pieces of a particular kind of cloth stocked in a shop, it is a matter of total indifference to him, out of which piece the quantity is supplied to him. What is asked for by a customer and when an offence is committed what is refused to be sold is a quantity of an article and therefore it is in respect of the article and not a quantity of it that the offence has been committed. Any other interpretation would make the provision wholly ineffective and reduce it to a ludicrous farce. The Legislature must be presumed to know and to have kept in mind the normal methods of business. With the knowledge that only very small quantities would normally be the subject of sale at one time, it could not have enacted a punishment which in effect would not serve as a punishment at all. It has been urged that huge stocks may be liable to be confiscated for a refusal to sell a small quantity of an article and that this might lead to abuse of power by the executive authorities. Any abuse of this kind is always liable to be remedied by the revisional powers of superior Courts and the possible danger of abuse is no sufficient argument for robbing the provision of all context and meaning. I would accordingly

1. Cri. Appeal No. 1131 of 1944, Emperor v. Tehl Ram.

answer the second question referred by saying that on conviction the whole quantity of an article stocked by the offending dealer is liable to be confiscated under S. 13 (3) of the Ordinance.

Din Mohammad J. — I agree.

Mahajan J. — I also agree.

G.N. *Answer accordingly.*

[Case No. 16.]

*** A. I. R. (33) 1946 Lahore 57**

FULL BENCH

ABDUR RAHMAN, MAHAJAN AND
ACHHRU RAM JJ.

*Musa Ji Lukman Ji — Defendant —
Petitioner*

v.

Durga Dass — Plaintiff — Respondent.

Civil Revn. Nos. 806 of 1943 and 102 of 1944,
Decided on 24th October 1944, from order of
Mahajan J., D/- 8th May 1944.

* (a) Contract Act (1872), S. 28—Agreement between parties that suit relating to disputes arising between them should be instituted in one only out of two Courts having jurisdiction is not void under S. 28 : ('23) 10 A.I.R. 1923 Lah. 425=75 I. C. 590 ; ('29) 16 A.I.R. 1929 Lah. 605=119 I. C. 481 and ('43) 30 A.I.R. 1943 Lah. 295=212 I. C. 411, OVERRULED.

An agreement between parties to a contract to the effect that a suit concerning disputes arising between them on the basis of that contract should be instituted in one only out of two competent Courts having territorial jurisdiction over the subject-matter of that suit is valid and enforceable and is not void under S. 28. [P 59 C 1]

Section 28 prevents parties from divesting Courts of their inherent jurisdiction and makes void only those agreements which absolutely restrict a party to a contract from enforcing the rights under that contract in ordinary tribunals. But it has no application when a party agrees not to restrict his right of enforcing his rights in the ordinary tribunals but only agrees to a limitation of the choice of forum which the law has conferred upon him and to a selection of one of those ordinary tribunals in which ordinarily a suit would be tried : ('23) 10 A.I.R. 1923 Lah. 425 = 75 I. C. 590 ; ('29) 16 A.I.R. 1929 Lah. 605=119 I. C. 481 and ('43) 30 A.I.R. 1943 Lah. 295=212 I. C. 411, OVERRULED; ('30) 17 A.I.R. 1930 Lah. 611, *Disting.*; *Case law discussed.* [P 59 C 1]

C. P. C. —

('44) Chitaley, S. 9 N. 5 Pt. 7.

('41) Mulla, page 126 Pts. (c), (d).

(b) Jurisdiction—Principle that consent cannot give or oust jurisdiction—Applicability—Inherent and territorial jurisdiction—Distinction (Per *Mahajan J.*).

The principle that parties cannot by consent confer jurisdiction on Court or deprive Court of jurisdiction only applies to cases of inherent jurisdiction of a Court over the subject-matter of a suit, but the question of territorial jurisdiction of a Court is not a question of inherent jurisdiction. An objection as

regards the territorial jurisdiction of a Court can be waived by a party and if it is not raised at earlier stages of a case it cannot be raised in a Court of appeal. The judgment or decree of a Court having no territorial jurisdiction over the subject-matter of a suit is not a nullity but is a judgment of a competent Court. [P 60 C 1, 2]

C. P. C. —

('44) Chitaley, S. 9 N. 5 Pts. 2, 3; S. 21 N. 1, Pts. 7, 8, 10, 11.

('41) Mulla, page 130 Pts. (v), (w), (g), page 128 Pt. (n); page 129 Pt. (q).

(c) Contract Act (1872), S. 23—Agreement to bring suit in one only out of two Courts having jurisdiction is not opposed to public policy. (Per *Mahajan J.*).

There is nothing against public policy in an agreement between the parties that a suit regarding disputes arising between them would be instituted in one only out of several competent Courts having territorial jurisdiction. So long as the case is heard by a competent Court which has jurisdiction in every way to hear it, there is nothing in public policy which dictates that, because other Courts which can also hear the same cannot hear it in view of the agreement, that is a matter against public policy. [P 61 C 1]

C. P. C. —

('44) Chitaley, S. 9 N. 5, Pt. 7.

('41) Mulla, page 126 Pts. (c), (d).

R. L. Chawala — for Petitioner.

Abdul Aziz — for Respondent.

Mahajan J.—Civil Revision No. 806 of 1943 and Civil Revision No. 102 of 1944 were referred by me to a Full Bench, the point involved in both these cases being the same, namely, whether an agreement between parties to a contract to the effect that a suit concerning disputes arising between them on the basis of that contract would be instituted in one of the two competent Courts having territorial jurisdiction over the subject-matter of that suit is a valid and an enforceable agreement or is void under the provisions of S. 28, Contract Act. Civil Revision No. 806 of 1943 concerns the case of Durga Das, plaintiff, against Messrs. Musa Ji Lukman Ji of Karachi. This suit was instituted for recovery of Rs. 3000 by way of damages. One of the clauses in the contract, Ex. P. 2, was to the following effect :

"If, however, it be deemed necessary to apply to the Court of law, the suit can only be filed in the Court at Karachi and through no other Court."

The contract related to the supply of 540 yards of striped suiting in three cases and is dated 8th June 1942. The contract was entered into at Lahore and the defendants carry on business at Karachi. Admittedly, therefore, the suit could be instituted within the territorial limits of the civil Courts at Karachi as well as within the territorial limits of the civil Courts at Lahore. The Subordinate Judge held that the clause in the indent mentioned above embodied an

agreement between the parties that any suit arising out of this indent would be instituted at Karachi and was not opposed to public policy and did not come in conflict with the provisions of S. 28, Contract Act. It may be mentioned that the suit had been instituted at Lahore instead of Karachi. The result of this finding was that the Subordinate Judge held that he had no jurisdiction to try the suit and he returned the plaint to the plaintiff for presentation in the Karachi Court. In other words, he gave effect to the agreement entered into between the parties. Against the order returning the plaint an appeal was preferred by the plaintiff to the District Judge, Lahore. The District Judge set aside the judgment of the Subordinate Judge and held that the Lahore Courts had jurisdiction and remanded the case for trial on the merits. In the view of the learned District Judge, the Lahore Courts had inherent jurisdiction to hear the case and, therefore, that inherent jurisdiction could not be divested by agreement arrived at between the parties. From the order of the District Judge remanding the case, the present petition for revision was preferred to this Court and was referred by me to a Full Bench for an authoritative decision on the point of jurisdiction involved in the case, particularly in view of the fact that there existed conflict of opinion on that point. While I heard this matter in Single Bench no other question was argued before me. Mr. Abdul Aziz, learned counsel for the respondent, pointed out at the Full Bench stage that the agreement made between the parties in this case by which Karachi Courts must hear any disputes between the parties on the basis of the contract had been cancelled and, therefore, it was open to the plaintiff to institute his suit in the civil Courts at Lahore. This point was not mentioned in any of the two Courts below and was not referred to before me. As the case will go back to a learned Single Judge, it is open to Mr. Abdul Aziz, if he is entitled to raise the point, to take up this question at that stage. The only point to be decided by the Full Bench is the proposition of law above stated. The parties to Civil Revision No. 102 of 1944 are Messrs. Tara Singh-Mul Singh, plaintiffs, and Messrs. Sohan Lal-Chaman Lal, defendants. This suit was for recovery of Rs. 1200 by way of damages on account of breach of contract on the defendants' part regarding ten bundles of towels agreed to be supplied by the defendants to the plaintiffs. In this case part of the cause of action arose at Delhi, part at

Rawalpindi and part at Cawnpore. The goods were to be delivered to the plaintiffs at Cawnpore and the price had to be paid at Cawnpore. The suit was instituted by the plaintiffs in the Court of Mr. Gobind Ram, Subordinate Judge, First Class, Rawalpindi. There was a clause in the contract made between the parties to the following effect :

"If any kind of dispute arose, it must be settled either through the Merchants Chamber of United Provinces, Cawnpore, or any Court at Cawnpore."

In spite of this clause the plaintiffs instituted the suit in the Court of the Subordinate Judge, Rawalpindi, and to this an objection was taken on behalf of the defendants that the suit could only be heard by a civil Court at Cawnpore and that the plaintiffs having entered into an agreement with the defendants to do so could not be allowed to select Rawalpindi as a forum for the suit. The learned Subordinate Judge gave effect to this objection and held that though the parties cannot by mutual agreement confer jurisdiction on or take away jurisdiction from, a particular Court, but where there are two or more Courts having concurrent jurisdiction and the parties by mutual consent agree to go to the one rather than to the other, then only that Court has jurisdiction to which the parties have themselves agreed to submit their disputes. The result was that the plaintiffs' plaint was returned for presentation to a proper Court. The plaintiffs appealed against this order to the District Judge, Rawalpindi, who allowed the appeal and remanded the case to the Senior Subordinate Judge for disposal according to law. He held that the agreement referred to in the contract that only a Court at Cawnpore would have jurisdiction to settle any dispute between the parties amounted to a deprivation of jurisdiction of the Rawalpindi Courts and was, therefore, illegal and void. Against the decision of the learned District Judge the present application for revision was made to this Court which was referred by me to a Full Bench along with the connected revision No. 806 of 1943 as the points involved in both the cases were common. As above stated, the only point for consideration and decision is whether an agreement between the parties selecting one of the two competent Courts to try the disputes arising between them is within the mischief of S. 28, Contract Act. Section 28, Contract Act, reads as follows :

"Every agreement, by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract, by the usual legal proceedings in the ordinary tribunals, or

which limits the time within which he may thus enforce his rights, is void to that extent."

The question, therefore, in other words is whether an agreement, between the parties to a contract in a case, where a suit can be tried within the territorial limits of several Courts, to the effect that it will only be tried in one of the Courts having territorial jurisdiction and that the parties will be limited to have recourse to only one of the several competent Courts is within the ambit of S. 28. On a plain reading of the section, I have no hesitation in answering that question in the negative. The section makes void only those agreements which *absolutely* restrict a party to a contract from enforcing the rights under that contract in ordinary tribunals. But this section has no application when a party agrees not to restrict his right of enforcing his rights in the ordinary tribunals but only agrees to a selection of one of those ordinary tribunals in which ordinarily a suit would be tried. This section, in my view, prevents parties from divesting Courts of their inherent jurisdiction, but it does not in any way vitiate an agreement between the parties by which a person who has the choice of the forum agrees to a limitation of that choice or agrees to the curtailment of the unlimited choice which law has conferred upon him. An agreement to that effect is not hit by the language of this section. The view that I have taken of this matter is supported by a considerable body of judicial opinion. In A. I. R. 1925 Mad. 1145¹ a learned Single Judge of the Madras High Court considered this matter and it was held that

"where there are two Courts both of which would normally have jurisdiction to try the suit, the parties may be allowed to agree among themselves that a suit should be brought in one of those Courts and not in the other. Such an agreement does not contravene the provision of S. 28, because the plaintiff is not thereby restricted absolutely from enforcing his rights under or in respect of the contract by the usual legal proceedings in the ordinary tribunals, as the restriction is only partial."

The Madras High Court has followed the view taken by the learned Single Judge in this case up to the present time. The latest case of that High Court on this point is a decision of King J. in A. I. R. 1944 Mad. 47.² At page 48 of the report it was observed as follows :

"There is a ruling of this High Court by Madhavan Nair J. in 49 M. L. J. 189,¹ which holds that under S. 28, Contract Act, a section which clearly

applies far more directly than S. 23 to facts of the kind with which we have now to deal, such a clause in a contract is not illegal. This ruling has been followed by other High Courts, e.g., Calcutta, Bombay and Allahabad and, so far as I am aware, has never been dissented from."

The Calcutta High Court has considered this question in 57 Cal. 1280.³ A clause similar to the one under consideration before us, it was argued, was *ultra vires* and illegal being in conflict with S. 28, Contract Act. It was ruled that the contention was unsound for the reasons given in the case in A. I. R. 1925 Mad. 1145.¹ The Bombay High Court has taken this view in three cases. A. I. R. 1924 Bom. 381⁴ is a Bench decision of that High Court. Though certain observations in this case support the view that I have taken, but it does not exactly cover the present case. The point is, however, fully covered by the case in A. I. R. 1928 Bom. 175,⁵ another Bench decision of that High Court. It was held that the agreement arrived at between the parties was binding and that any suit in respect of the transactions between the parties should be brought in the Court selected by the parties. The latest case from that Court is a Single Bench decision of Broomfield J. in 156 I. C. 277.⁶ In this case it was ruled that S. 28, Contract Act, does not prohibit the parties to a contract from selecting one of two competent tribunals for the disposal of their disputes and that such agreements are valid. In the Allahabad High Court the point has been considered in three cases. The first case of that High Court on this subject is a decision of Bajpai J. in A. I. R. 1936 ALL. 514.⁷ The learned Judge observed as follows :

"Now there can be no doubt that where there are two Courts both of which would normally have jurisdiction to try the suit, the parties may be allowed to agree among themselves that the suit should be brought in any of those Courts and not in the other."

Previous Madras, Calcutta and Bombay cases were followed. The next Allahabad case is A. I. R. 1937 ALL. 650.⁸ That case refers to an agreement to refer the dispute to

3. ('31) 18 A. I. R. 1931 Cal. 279 : 57 Cal. 1280 : 130 I. C. 252, *Miltan & Co. v. Ojha Automobile Engineering Co.*

4. ('24) 11 A. I. R. 1924 Bom. 381 : 80 I. C. 523, *Haji Abdulla Haji Cassum v. George Reginald Stamp.*

5. ('28) 15 A. I. R. 1928 Bom. 175 : 110 I. C. 727, *Tilakram Chaudhuri v. Kodumal Jethanand.*

6. ('35) 22 A. I. R. 1935 Bom. 198 : 156 I. C. 277, *Khandesh Lakshmivilas Mills Co. v. Vinayak Atmaram.*

7. ('36) 23 A. I. R. 1936 All. 514 : 163 I. C. 919, *Gopal Das v. Hari Kishan Das.*

8. ('37) 24 A. I. R. 1937 All. 650 : 171 I. C. 584, *Gainda Lal v. Rameswar Das.*

1. ('25) 12 A. I. R. 1925 Mad. 1145 : 90 I. C. 1019 : 49 M. L. J. 189, *Achratlal Kesavlal Mehta & Co. v. Vijayam & Co.*

2. ('44) 31 A. I. R. 1944 Mad. 47 : 211 I. C. 480, *Raghavayya v. Vasudevayya Chetty.*

arbitration and, therefore, is not strictly relevant to the point under discussion. The last Allahabad case is a Bench decision of that Court in I. L. R. 1940 ALL. 232.⁹ The view of the Calcutta High Court in 57 Cal. 1280³ and the Bombay High Court in A. I. R. 1928 Bom. 175⁵ was followed in this case. Our attention was also drawn to a decision of the Nagpur Court, A.I.R. 1937 Nag. 334 = I. L. R. 1939 Nag. 641.¹⁰

It will thus be seen that there is a considerable body of judicial opinion in support of the interpretation that I have ventured to place on S. 28, Contract Act. Not only on the plain reading of the section but also in view of the course of decisions of the various High Courts, in my judgment it should be held that an agreement of the kind mentioned above is not within the mischief of S. 28, Contract Act.

Mr. Harnam Singh, learned counsel representing the contrary view, placed great reliance on a Bench decision of this Court in A. I. R. 1923 Lah. 425.¹¹ The following observations were made in this case :

"As regards the plea of want of jurisdiction it is clear that the litigants can, by agreement *inter se* divest a Court of its inherent jurisdiction over the subject-matter of a suit no more than they can confer jurisdiction on it by consent where it has none. The learned counsel for the defendants-appellants could cite no authority in support of his proposition that the agreement to have the suit decided by the Ferozepur Courts to the exclusion of other Courts which could lawfully entertain the same was enforceable."

With great respect to the observations made in this case, I respectfully record my dissent. The doctrine of conferring jurisdiction on or depriving Courts of jurisdiction by consent only applies to cases of inherent jurisdiction of a Court over the subject-matter of a suit. This proposition has been conceded in this decision, but the question of territorial jurisdiction of a Court is not a question of inherent jurisdiction. An objection as regards the territorial jurisdiction of a Court can be waived by a party and if it is not raised at earlier stages of a case it cannot be raised in a Court of appeal; see in this connexion the provisions of S. 21, Civil P. C., and S. 99 of the same Code. The judgment or decree of a Court having no territorial jurisdiction over the subject-matter of a suit is not a

nullity but is a judgment of a competent Court. Therefore, in my view the ratio on which the Bench decided the case in A. I. R. 1923 Lah. 425¹¹ could not be made applicable to the facts of that case. There was no defect of inherent jurisdiction in that case as both Courts were Courts of competent jurisdiction. With great respect I may further observe that it seems that the attention of the learned Judges in that case was not drawn to the language of S. 28, Contract Act, and it was not pointed out that the case before their Lordships was not a case of depriving a Court of its jurisdiction but merely a case of enforcing an agreement by one party against another, which agreement was valid and not vitiated by any provisions of the substantive or procedural law. It was not argued that the case was simply one where the plaintiff who had the choice of forum had by agreement with the other party limited his choice and had not thereby affected or ousted the jurisdiction of any civil Court. Both the Courts retained their jurisdiction to try the suit. This case, therefore, was not in my view correctly decided. The previous decisions of the other High Courts were not even mentioned or discussed.

The next case on which Mr. Harnam Singh placed reliance is a Single Bench decision of Jai Lal J., in A. I. R. 1929 Lah. 605.¹² The learned Single Judge followed the Bench decision of its own Court which he was bound to do. This case, therefore, does not throw any further light on the subject.

The last case on the subject is a judgment of my learned brother Abdur Rahman J. in A. I. R. 1943 Lah. 295.¹³ Here again, my learned brother followed the Bench decision in A. I. R. 1923 Lah. 425¹¹ and the Single Bench decision of Jai Lal J., and he found himself bound by those cases. As I have already pointed out, the Bench decision of this Court in A. I. R. 1923 Lah. 425¹¹ does not lay down the law correctly. The decisions that followed it should automatically be held as not placing correct interpretation on S. 28, Contract Act.

There is a Single Bench decision of Jai Lal J., in A. I. R. 1930 Lah. 611,¹⁴ which was relied upon by the Subordinate Judges in support of the view that the agreement was

9. ('40) 27 A. I. R. 1940 All. 241 : I. L. R. 1940 All. 232 : 189 I. C. 268, Bichcha Ram Baburam Firm v. Firm Baldeo Shai Suraj Mal.

10. ('37) 24 A. I. R. 1937 Nag. 334 : I. L. R. 1939 Nag. 641 : 174 I. C. 582, National Petroleum Co. Ltd., Bombay v. Meghraj Ramkaranji.

11. ('23) 10 A. I. R. 1923 Lah. 425 : 75 I. C. 590, Kidri Prasad v. K. R. Khosla.

12. ('29) 16 A. I. R. 1929 Lah. 605 : 119 I. C. 481, Jagan Nath Amar Nath v. Burma Oil Co. Ltd.

13. ('43) 30 A. I. R. 1943 Lah. 295 : 212 I. C. 411, Radha Kishen v. Bombay Co. Ltd.

14. ('30) 17 A. I. R. 1930 Lah. 611 : 122 I. C. 488, Abnash Chandar v. Auto Supply Co. Ltd., Lahore.

valid. After a careful reading of this decision it seems to me, with great respect to the learned Judge, that it does not clarify the matter. It is observed in this case that where in spite of the fact that under the ordinary provisions of law a particular Court would have jurisdiction, the parties provided that another Court, to the exclusion of the former Court, shall have jurisdiction to adjudicate upon the disputes, it would be illegal. This is not the case here. Jurisdiction was not conferred on any Court which was not a Court of competent jurisdiction, on the other hand, the Court to which the parties agreed to go was a Court of competent jurisdiction. It was further observed in this very case that cases in which the agreement specified the place where the terms of the contract had to be carried out, it is valid one. This case, therefore, is not of much assistance in deciding the present case.

Mr. Harnam Singh lastly drew our attention to a Nagpur decision in A.I.R. 1935 Nag. 48.¹⁵ This is a Single Bench decision of that Court and is contrary to a later decision of the same Court. This, therefore, does not help in the consideration of this case very much. It may be observed that there is nothing against public policy in an agreement arrived at between the parties that where several Courts have territorial jurisdiction to hear a case they may limit their choice to one of those Courts. So long as the case is heard by a competent Court who has jurisdiction in every way to hear it, there is nothing in public policy which dictates that, because other Courts can also hear the same because they cannot hear it in view of the agreement, that is a matter against public policy. In my opinion, therefore, the cases cited by Mr. Shamair Chand and Mr. Rattan Lal Chawla lay down the law correctly on the subject and the three cases of this Court do not lay down a sound proposition of law and should, therefore, be overruled. My answer to the Full Bench reference, therefore, is that the agreements entered into in the contracts in both these cases were valid and enforceable and should have been given effect to by the Courts below. The result, therefore, is that both the civil revisions are allowed and the decisions of the lower appellate Court set aside and those of the Subordinate Judges restored. Both the cases, however, will be sent back to the learned Single Judge for passing final orders on these petitions in

view of the answer of the Full Bench to the legal question referred to it.

Abdur Rahman J. — Agreements such as found to have been made between the parties to the two suits referred to by my learned brother in his judgment cannot be held to fall under S. 28, Contract Act, inasmuch as they do not absolutely restrict any party from enforcing his rights under the contracts by the usual legal proceedings in the ordinary tribunals of the country. Karachi in the first case and Cawnpore in the other had jurisdiction to decide the two suits admittedly. The restrictions found in the contracts were not, therefore, absolute but only partial. The position would have been substantially different if the parties had agreed not to institute the suits in any of the Courts which had according to law jurisdiction to entertain the same but in Courts which possessed no jurisdiction at all. Those would have been cases of absolute restriction and of conferring jurisdiction on tribunals where none existed. But in agreeing not to bring suits in one out of the two Courts, both of which were competent to try them, parties cannot be said to have contracted out of the jurisdiction vested in that Court or to be depriving it of the jurisdiction which it otherwise possessed (and would continue to possess as long as it could entertain a suit of that kind in accordance with the law in force) but to have deprived themselves of the right of proceeding in that Court with a reservation that they would continue to have a right to proceed in others which have in law jurisdiction to try. The parties did not thus deprive any Court of its inherent or even territorial jurisdiction but themselves of their right of exercising it partially in one out of the two or three Courts. Jurisdiction is one thing, right to exercise it another. In view of this it appears to be unnecessary to enter into the controversy regarding the territorial or inherent jurisdiction to which a passing reference has been made by my learned brother. I therefore agree in answering the question formulated by him in the beginning of his judgment in affirmative.

Achhru Ram J. — I agree and have nothing to add.

G.N.

Revisions allowed.

15. (35) 22 A. I. R. 1935 Nag. 48 : 157 I. C. 315, National Petroleum Co., Bombay v. F. Rebello.

[Case No. 17.]

A. I. R. (33) 1946 Lahore 62

ABDUR RAHMAN J.

Mohan Lal — Defendant — Petitioner
v.*Firm Muni Ram Nand Lal —*
Plaintiff — Respondent.

Civil Revn. No. 194 of 1945, Decided on 14th November 1945, from order of Senior Subordinate Judge (with small cause powers), Ambala, D/- 10th October 1944.

(a) Provincial Small Cause Courts Act (1887), S. 25—Material irregularity—Small cause suit—Date of hearing fixed in the absence of officer empowered to act as Court of Small Causes, is invalidly fixed—Court taking up case on such date and passing ex parte decree without issuing notice to defendant acts with material irregularity.

Where in a small cause suit, an order fixing a date in the case is passed on a day on which there was no officer who could have the powers of a Judge of the Court of Small Causes, the date so fixed is not validly fixed and the Court cannot therefore take up the case on that date without issuing a notice to the defendant and if it records evidence on such a day and passes an ex parte decree, the Court acts with material irregularity. [P 63 C 2]

(b) Provincial Small Cause Courts Act (1887), S. 17—Security furnished after application but within limitation—Section 17 is complied with.

Where after the application under S. 17, security is furnished by the petitioner within the time during which the application for setting aside the ex parte decree could have been made by him, the provisions of S. 17, have been complied with and the application for setting aside the ex parte decree may be deemed to have been legally presented for the first time on the day when deposit was made: ('43) 30 A.I.R. 1943 Bom. 237, *Rel. on*; ('38) 25 A.I.R. 1938 Lah. 18, *Disting.* [P 64 C 1]

Asa Ram Aggarwal — for Petitioner.

Jindra Lal — for Respondent.

Order. — This is a petition for revision from the order of the Senior Subordinate Judge at Ambala acting as a Judge of the Court of Small Causes dismissing the petitioner's application for setting aside an ex parte decree which had been passed against him on 13th June 1944. In order to appreciate the various points which have been debated before me it is necessary to give the facts in detail. The suit was instituted by the respondent in the Court of Small Causes at Ambala on 19th February 1944. Summonses were ordered to be issued to the defendant for 21st March 1944, but as the defendant was not served, they were ordered to be issued again for 2nd May 1944, on 21st March 1944. It appears that between 21st March 1944 and 2nd May 1944, the presiding officer of the Court of Small Causes who was also functioning as the Senior Subordinate Judge was transferred and no one was sent in his

place who would have the powers of a Judge of the Court of Small Causes. When the case came up for hearing on 2nd May 1944, the parties were present but as no one was competent to pass any order, the reader made a note on the file that the Judge had already been transferred and that Sardar Balwant Singh, Senior Subordinate Judge, had not received the powers to act as a Judge of the Court of Small Causes so far. He also added that Sardar Balwant Singh was holding his Court on that day at Ambala Cantonments. A date was then given by the reader to the parties to come to the Court on 23rd May 1944. The powers were not received even on that day and the same reader made another note that although the counsel for the parties were present, yet the Senior Subordinate Judge was holding his Court again at Ambala Cantonments and that his powers to act as a Judge of the Court of Small Causes had not been received until then. A note was, therefore, made that the case would come up before the presiding officer of the Court on 13th June 1944. The case came up then on 13th June 1944 before the Judge of the Court of Small Causes who was also the Senior Subordinate Judge. As the defendant was not present, the Judge after recording plaintiff's evidence passed an ex parte decree.

The defendant made an application which was apparently written the same day and was presented before the Judge of the Court of Small Causes on the following day. The application was put before the Judge with the report which he had asked for on 15th June 1944 on which date an order was passed that in so far as the application was for setting aside the ex parte decree the defendant must put in security under S. 17, Provincial Small Cause Courts Act. The case was then ordered to come up for hearing on 22nd June 1944. By that date the security had been filed. It was attested and a notice was ordered to be issued to the decree-holder for 20th July 1944. An objection was raised on behalf of the decree-holder when he appeared in pursuance of the notice issued to him that the application was incompetent as security had not been furnished at or before the time when it was presented and as the words of S. 17 were mandatory the application could not be entertained. This objection was given effect to and the application was dismissed. The petitioner has come up in revision.

Mr. Asa Ram Aggarwal, learned counsel for the petitioner, raised before me on the last hearing the contention that his client

was not bound to appear on 13th June 1944, as the reader who had fixed that date for hearing had no jurisdiction to do so. It was also urged that the case having been taken up by Sardar Balwant Singh who was officiating as a Senior Subordinate Judge could not have been retransferred to the Senior Subordinate Judge without an order by the District Judge under S. 24, Civil P. C. In short, the contention is that the presiding officer of the Court was not legally seized of the jurisdiction to try the suit on 13th June 1944 and that the decree passed against the petitioner cannot but therefore be regarded as having been passed without jurisdiction. In regard to the objection advanced by the decree-holder before the lower Court as to the petitioner's failure to furnish security at or before the time when the application was made by him to set aside the ex parte decree, it was urged in the first instance that the provisions of S. 17, Provincial Small Cause Courts Act, were not mandatory but merely directory. In support of this contention, my attention was drawn to a decision of the Punjab Chief Court reported as 108 P. R. 1894¹ which appears to have been followed by a Full Bench of this Court in 12 Lah. 359.² In the alternative it was urged that even if the provisions of S. 17 were held to be mandatory, the application presented on behalf of his client may be deemed to have been presented on 22nd June 1944 as he had on or before that day complied with the provisions of S. 17, Provincial Small Cause Courts Act, within the statutory period of 30 days for setting aside the ex parte decree. There being, it was submitted, no question as to the period of limitation having been extended, the application might be taken to have been presented on 22nd June 1944 and should not, therefore, have been dismissed for the alleged failure to comply with the requirements of that section. In support of this contention reliance was placed on the decisions of two learned Chief Justices of Allahabad and Bombay in A. I. R. 1939 All. 503³ and A. I. R. 1943 Bom. 237.⁴ Learned counsel for the respondent, on the other hand, urged that in view of the subse-

quent amendment of S. 17, Provincial Small Cause Courts Act, the decision in 108 P. R. 1894¹ or in 12 Lah. 359² has no application and that the matter had been set at rest by a subsequent decision of a Division Bench of this Court in 18 Lah. 728⁵ where it was held that the provisions of the amended S. 17, Provincial Small Cause Courts Act, were not directory but mandatory.

On the question of jurisdiction it was urged that there was no proof on the record that the Judge had not ordered the case to come up on the dates noted by the reader on the record and that in the absence of any such evidence the presumption ought to be that the dates had been validly fixed by the Judge himself. To take up the question of jurisdiction first. It appears that there was no officer at Ambala on 2nd May 1944 or on 23rd May 1944 who had been clothed with the jurisdiction to hear suits of small cause nature and it is, therefore, obvious that no order could have been passed by any person at Ambala on those days fixing any date in the case. Even if I were to assume, as learned counsel for the respondent asked me to do, that the Judge himself might have noted the date in the register of the Court on the proceeding day I would be faced with situation that the presiding officer himself had no power to fix a date either on 2nd May or on 23rd May 1944. I must, therefore, hold that 13th June 1944, the date on which the case was taken up by the Court and decreed ex parte, was not fixed by any officer who was empowered to pass orders in the case. It would, therefore, follow that 13th June had not been validly fixed and the Court could not, therefore, take up the case on that day without issuing a notice to the defendant-petitioner and that in recording evidence and passing a decree, the Court acted with material irregularity.

This, however, would be of no avail to the petitioner if I were to hold as I am in view of the decision in 18 Lah. 728⁵ bound to do that the provisions of the amended S. 17, Provincial Small Cause Courts Act, being mandatory in character were bound to be complied with by the petitioner before he had made his application to set aside the ex parte decree to the Court. The decision in 18 Lah. 728⁵ is not, however, applicable as no security had been furnished by the petitioner in that case within the 15 days prescribed by law while in the present case

1. ('94) 108 P. R. 1894, Muhammad Fazl Ali v. Karim Khan.

2. ('31) 18 A.I.R. 1931 Lah. 332 : 12 Lah. 359 : 131 I. C. 635 (F.B.), Gedi Mal Dharam Das v. Huna Mal Shedhu Ram.

3. ('39) 26 A.I.R. 1939 All 503:ILR (1939) All 554 : 183 I. C. 691, Kabul Singh v. Jai Parkash.

4. ('43) 30 A.I.R. 1943 Bom 237 : 209 I. C. 637, Tarachand Hirachand v. Durappa Tavanappa Patravali.

5. ('38) 25 A.I.R. 1938 Lah. 18 : I.L.R. (1937) 18 Lah. 728 : 173 I. C. 952, Mohammad Ramzan Khan v. Khabli Khan.

[Case No. 18.]

A. I. R. (33) 1946 Lahore 64

ABDUR RAHMAN J.

Nazar Mohammad—Petitioner

v.

Mehta Kirpa Ram and others—

Respondents.

Civil Revn. No. 497 of 1944, Decided on 8th November 1945, from order of Senior Sub-Judge, Jhelum, D/- 14th April 1944.

Punjab Relief of Indebtedness Act (7 [VII] of 1934), Ss. 7 and 25—Suit to recover mortgage-money by sale — Suit is for recovery of debt and can be stayed under S. 25—Stay order refused on incorrect grounds—Debt Conciliation Board abolished and not revived within reasonable time—Revision against order of refusal to stay is infructuous, as suit even if had been stayed would be required to be ordered to be proceeded with.

The Subordinate Judge at J refused to stay a civil suit brought against the petitioner for recovery of mortgage-money by sale of mortgaged property, on the ground that the suit was not for recovery of debt. The Debt Conciliation Board at J was abolished and in spite of the lapse of one year no other Board had been brought into existence. The petitioner filed revision against order of refusal :

Held that the suit was for recovery of debt within the meaning of S. 7 and could be stayed under Section 25; [P 64 C 2]

Held further that even if the decision of the Subordinate Judge were held to be incorrect, yet in view of the abolition of the Debt Conciliation Board itself and of its not having been revived within a reasonable time, the suit, even if ordered to have been stayed under S. 25, would have to be ordered to be proceeded with. The revision must, therefore, be dismissed. [P 65 C 1]

*Darbari Lal Khanna—*for Petitioner.

*Gyan Singh—*for Respondents.

Order.—This is a petition for revision against the order of the Senior Subordinate Judge at Jhelum refusing to stay a civil suit brought by the respondent for the recovery of the money due to him by the sale of certain property under mortgage on the ground that the suit for sale was not a suit for recovery of money and could not therefore be stayed under S. 25, Punjab Relief of Indebtedness Act, even after the receipt of a notice issued by the Debt Conciliation Board. Had that been the only point in the case, the matter would have been an easy one as according to S. 7, the term 'debt' has been defined to include all liabilities of a debtor in cash or in kind, secured or unsecured. In that case I would have had to agree with the petitioner's contention that the order of the Senior Subordinate Judge was not justified. But a further complication arose after the decision of the Senior Subordinate Judge. The Debt Conciliation Board at Jhelum was abolished by the Governor of the Punjab by means of Notification No. 2535-E, dated 30th August 1944, and in spite of the

security was furnished by the petitioner within the 30 days in which he could have made an application for setting aside the ex parte decree. Had the petitioner not furnished the security within the 30 days, I would have been bound to hold that the period could not have been extended by the Judge of the Court of Small Causes. But in this case no question of extension arises as security had been furnished by the petitioner on or before 22nd June 1944 in pursuance of the order of the Judge dated 15th June 1944 that is within the time during which the application for setting aside the ex parte decree could have been made by him. The application, therefore, dated 14th June 1944, did not become a regular application until 22nd June 1944. As the provisions of S. 17 had been complied with by that date and the application could have been presented for the first time on that day, there is nothing which can debar me from holding that the application for setting aside the ex parte decree may be deemed to have been legally presented for the first time on 22nd June 1944. I am supported in this view by Beaumont C. J., who had held in A.I.R. 1943 Bom. 237⁴ that it was sufficient if the deposit under S. 17 was made within the time allowed by the law of limitation for setting aside the ex parte decree.

I might add here that I was not impressed by the contention that Sardar Balwant Singh's Court was different from the Court of the Senior Subordinate Judge. He was officiating as a Senior Subordinate Judge and could have passed orders in this case without any formal order of transfer under S. 24, Civil P. C., if he had been invested with powers to try small cause suits. When he relinquished the charge of his office as the Senior Subordinate Judge, the suit continued to remain pending in the Court in which it was and in which it had along remained.

For the above reasons I would allow this revision and quash the order of the Court below. The result is that the ex parte decree passed against the petitioner is set aside and the case sent back for trial and decision according to law. As some of the points urged by the petitioner were not mentioned in his grounds of revision, I would make no order as to costs in this Court. The parties are directed to appear before the trial Court on 3rd December 1945.

V.B.

Revision allowed.

lapse of over a year no other Board has been brought into existence. Learned counsel for the respondent, therefore, raised an objection that even if the decision of the lower Court in regard to the suit not being one for the recovery of a debt were held to be incorrect, yet in view of the abolition of the Debt Conciliation Board itself and of its not having been revived within a reasonable time, the suit, even if ordered to have been stayed by the Senior Subordinate Judge under S. 25 of the Act, would have to be now ordered to be proceeded with and this revision must, therefore, be held to be infructuous. Learned counsel for the petitioner, on the other hand, contends that the provisions of S. 25 of the Act, were imperative and that the suit pending before the civil Court would have to remain suspended until the Board had dismissed the application or an agreement had been made under S. 17 of the Act. There is no merit in that contention for it proceeds on the assumption that the Board was in existence and was capable of functioning as such. When this was pointed out to learned counsel for the petitioner, he tried to seek refuge under S. 8 (4) of the Act which authorised the Provincial Government to establish another Board within the same local limits in which the former Board had jurisdiction and to declare the new Board to be the successor in office of the first Board. It was urged by learned counsel for the petitioner that the Provincial Government might yet establish another Conciliation Board and it was, therefore, incumbent upon the respondent to move the Provincial Government and to ascertain whether it had any intention so to do. I am not impressed by that contention. When the Provincial Government abolished the Board on 14th June 1944 and did not care to appoint another Board within a reasonable time, I must take it for the purpose of the present case that the Provincial Government had no desire to do so and in any case to appoint any other Board that would be a successor in office to the first Board. I must, therefore, hold that the suit, even if it had been ordered to be stayed by the Senior Subordinate Judge on the receipt of the order under S. 25 of the Act as he should have done, would have now been allowed to be proceeded with.

For the above reasons the revision must be held to be infructuous and is dismissed. But I would in the circumstances make no order as to costs.

V.B.

Revision dismissed.

[Case No. 19.]

** A. I. R. (33) 1946 Lahore 65

FULL BENCH

BECKETT, MAHAJAN, AND TEJA
SINGH JJ.*Firm Malik Des Raj Faqir Chand*
Plaintiffs — Appellants
v.*Firm Piara Lal Aya Ram and others*
Defendants—Respondents.

First Appeal No. 359 of 1942, Decided on 5th March 1945, from order of Senior Sub-Judge, Jhang, D/- 23rd October 1942.

*(a) Evidence Act (1872), Ss. 21 and 145—
Admission — Proof of relevancy and value of
— Putting admission to witness before proof,
whether and when necessary.

(1) A party's previous admission is relevant under S. 21 and can be used as evidence against him if that party has not appeared in the witness-box at all. The value of the admission as a piece of evidence depends on the circumstances of each case but ordinarily an admission is a valuable piece of evidence. [P 73 C 1]

(2) An admission is a relevant piece of evidence and can be used as legal evidence against a party even in cases where the party appears in the witness-box but makes no statement inconsistent or contradictory to that admission and a denial of that admission is not involved in the statement made by the party in the witness-box by considering the statement as a whole. In this case there is no conflict between the sworn word in Court and the previous admission and the case is, therefore, outside the ambit of S. 145, and therefore it follows that it is outside the rule laid down in ('15) 2 A. I. R. 1915 P. C. 7. [P 73 C 1, 2]

(3) Where a party has gone into the witness-box on the point in issue and in the witness-box has made a statement inconsistent with the admission or the statement made in the witness-box involves the denial of the previous admission or runs counter to that admission, then the previous admission cannot be used as legal evidence in the case against that party unless the attention of the witness during cross-examination was drawn to that statement and he was confronted with the specific portions of that statement which were sought to be used as admissions. Without complying with the procedure laid down in S. 145, the admission contained in the previous statement cannot be used as legal evidence against that party : ('15) 2 A. I. R. 1915 P. C. 7, *Foll.*; ('30) 17 A. I. R. 1930 Lah. 410, *Expl.*; ('27) 14 A. I. R. 1927 Lah. 377, *Doubted*; *Case law discussed.* [P 73 C 2]

(b) Evidence Act (1872), S. 21 — Admission — Party's admission—Relevancy and value of, considered.

The rule contained in S. 21 is that admissions are relevant and provable, but if they are self-serving, then generally they are not receivable in evidence. If the admission is a self-harming one then, with few exceptions, it is usually considered as a proof of a very satisfactory kind. Admissions are valuable pieces of evidence, as the rule is that what a party admits to be true is presumed to be true unless the contrary is established. Under this section admissions of a party on a point at issue are, therefore, relevant pieces of evidence in sup-

port of that issue, and unless there is anything else in the Evidence Act or any other statute which enjoins that such admissions in any particular contingency would not be used as legal evidence or that they would not be used without complying with certain formalities it will not be possible to hold that they are inadmissible in evidence. On the other hand, they will be treated as good evidence in a case unless in particular circumstances their value is otherwise very little. [P 67 C 2]

(c) Evidence Act (1872), S. 145 — Principle underlying section explained—Party not making in witness box any statement inconsistent with his previous admission — Such admission may be proved against him without his being given opportunity to explain it.

The principle underlying S. 145 is that contradicting a witness by a previous inconsistent statement of his is a usual and even effective mode of discrediting him, and therefore it has been provided that if it is intended to contradict a witness his attention must be drawn to that part of the previous statement by which it is intended to contradict him in order to enable him to explain the inconsistency between the statement in Court and the previous inconsistent statement. The section deals with the cross-examination of a witness and has no reference to a case where a person making the previous statement has not appeared as a witness and given evidence as such. No other section of the Evidence Act prohibits or bars the use of an admission made by a party antecedent to the suit as evidence unless that party has been confronted with the previous admission relevant on the issue to be decided in the case. [P 67 C 2; P 68 C 1]

If an admission is proved against a party and his attention has been drawn to it (it must be taken that his attention was drawn when in his face the other party has proved that admission), then it is the duty of the party as a party to that case to explain that admission, and if he does not go into the witness-box the law casts no duty on the opposite party to call him there and to confront him with his previous statement. It is only in cases where the party goes into the witness-box and makes a statement inconsistent with the previous statement that a duty is cast by the provisions of S. 145 on his opponent to confront him with his statement inconsistent with the statement made in Court. ('34) 21 A. I. R. 1934 Pat. 55 and ('36) 23 A. I. R. 1936 Pat. 588, *Dissent*. [P 72 C 1]

Kundan Lal Gosain, Jagdish Narain and Inder Dev Dua — for Appellants.

A. N. Grover — for Respondents.

Mahajan J. — In Regular First Appeal No. 359 of 1942 the following question of law has been referred for decision by a larger Bench :

"Whether an admission made by a party to a suit can be utilized against him without its being put to him in the witness-box ?"

This was a plaintiffs' appeal in a suit for recovery of a sum of Rs. 8000. The contest in the suit was between a firm Malik Des Raj Faqir Chand as plaintiff and firm Piyara Lal Aya Ram, as defendant. Defendants 2 to 7 were all members of the same family and defendant 8 was a stranger to the family but was related by marriage to Des Raj of

the plaintiff's firm, his wife being Des Raj's daughter. The plaintiffs' case was that they had dealings with the defendants from 28th November to 17th August 1939 and on the foot of these dealings they were entitled to sue for the recovery of Rs. 8000 from the defendants. Excepting defendant 8 the plaintiffs' claim was denied by all the defendants. It was denied that the defendants had any account with the plaintiff firm or that anything was due from them. It was pleaded that the suit was barred by limitation. The Subordinate Judge dismissed the suit against the defendants other than Kundan Lal defendant 8.

Before the Division Bench the plaintiffs placed reliance on an admission made by Ram Sahai one of the defendants and contained in an award of one Mela Ram to prove that in December 1939 a sum of about Rs. 7000 was due by the defendant firm to the plaintiff firm, (Ex. P. W. 4/8). The signatures of Ram Sahai on Ex. P. W. 4/8 were admitted by his counsel but it was argued on defendants' behalf that no opportunity had been given to Ram Sahai to give his explanation for the admission of liability contained in this document and that he had not been confronted with it when he appeared in the witness-box and that therefore this admission could not be used as legal evidence against him. Reliance was placed in support of that proposition on a Bench decision of this Court in 11 Lah. 410,¹ and on several other decisions of this Court and other Courts. The plaintiffs' counsel contended that the above rule had no application to cases of admission made by parties and only applied to persons who had appeared as witnesses during the trial of a suit other than the parties. The plaintiffs in support of their case placed reliance on a Bench decision of the Punjab Chief Court in 31 P. R. 1903.² In view of importance of the point involved the question above referred to was referred to a larger Bench.

It may be observed that in the present case Ram Sahai appeared in the witness-box and gave evidence. His attention was not specifically drawn to the admission made by him and contained in Ex. P. W. 4/8. Whether in the witness-box Ram Sahai made a statement expressly contradictory to the admission contained in Ex. P. W. 4/8 or whether that statement read as a whole involves such a contradiction is a matter

1. ('30) 17 A.I.R. 1930 Lah. 991 : 11 Lah. 410 : 123 I. C. 278, Ghulam Murtaza v. Nagina.

2. ('03) 31 P. R. 1903, Natha v. Hurmat.

that has to be decided by the Division Bench. Further, what value has to be attached to that admission is again a matter for the Division Bench. This Full Bench is only concerned with the hypothetical proposition whether an admission made by a party to a suit antecedent to the suit can be utilised against that party during the suit without its being put to him in the witness-box if he offers himself as a witness and gives evidence or even otherwise.

In order to satisfactorily answer the question, it is necessary to set out various situations that may arise in respect of admission made by a party directly or indirectly antecedent to the suit. Such admissions may be contained expressly in previous statements made in proceedings or may be inferable from correspondence or other documents of that party. The matter can be examined in reference to three possible situations that can arise: (1) An admission on a point in issue has been made by a party antecedent to the suit and it is proved against him by having recourse to the various provisions of the Evidence Act concerning the proof of previous admissions made by a party. The party does not go into the witness-box and otherwise takes no steps to explain the admission. Whether in that situation the admission is relevant and can be used as legal evidence to prove that issue on which the admission is relevant without the party being confronted with the admission and called into the witness-box for that purpose? (2) The party goes into the witness-box and gives evidence in the case, but makes no statement directly or indirectly contradictory to or inconsistent with the previous admission that has been formally proved and placed on the record. Whether in that situation the previous admission can be used as legal evidence in proof of the issue on that point without confronting the witness with the statement which is intended to be used as an admission. (3) The party whose admission is sought to be used as legal evidence in the case on the point in issue goes into the witness-box and makes a statement as a witness contradictory to and inconsistent with the previous admission or the statement is such which read as a whole is in substance contradictory to the admission made antecedent to the suit. Whether in that situation the previous statement can be used as an admission and legal evidence in the case to prove the issue on the point without confronting the witness with that admission? Before attempting an answer to anyone of the above propositions, it is neces-

sary to consider the relevant provisions of the Evidence Act on this subject. Admissions as defined in Ss. 17 to 20, Evidence Act, have been made relevant evidence by S. 21 which is in these terms:

"Admissions are relevant and may be proved as against the person who makes them, or his representative in interest; but they cannot be proved by or on behalf of the person who makes them or by his representative in interest, except in the following cases:

(1) An admission may be proved by or on behalf of the person making it, when it is of such a nature that, if the person making it were dead, it would be relevant as between third persons under S. 32.

(2) An admission may be proved by or on behalf of the person making it, when it consists of a statement of the existence of any state of mind or body, relevant or in issue, made at or about the time when such state of mind or body existed and is accompanied by conduct rendering its falsehood improbable.

(3) An admission may be proved by or on behalf of the person making it, if it is relevant otherwise than as an admission."

Briefly stated, the rule is that admissions are relevant and provable, but if they are self-serving, then generally they are not receivable in evidence. If the admission is a self-harming one then with few exceptions it is usually considered as a proof of a very satisfactory kind. Admissions are valuable pieces of evidence, as the rule is that what a party admits to be true is presumed to be true unless the contrary is established. Under this section admissions of a party on a point at issue are, therefore, relevant pieces of evidence in support of that issue, and unless there is anything else in the Evidence Act or any other Statute which enjoins that such admissions in any particular contingency would not be used as legal evidence or that they would not be used without complying with certain formalities it will not be possible to hold that they are inadmissible in evidence. On the other hand, they will be treated as good evidence in a case unless in particular circumstances their value is otherwise very little. The only other section that deals with this question is S. 145, Evidence Act, which is in these terms:

"A witness may be cross-examined as to previous statements made by him in writing or reduced into writing, and relevant to matters in question, without such writing being shown to him, or being proved; but, if it is intended to contradict him by the writing, his attention must, before the writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him."

The principle underlying this section is that contradicting a witness by a previous inconsistent statement of his is a usual and even effective mode of discrediting him, and therefore, it has been provided that if it is

intended to contradict a witness his attention must be drawn to that part of the previous statement by which it is intended to contradict him in order to enable him to explain the inconsistency between the statement in Court and the previous inconsistent statement. The section deals with the cross-examination of a witness and has no reference to a case where a person making the previous statement has not appeared as a witness and given evidence as such. No other section of the Evidence Act prohibits or bars the use of an admission made by a party antecedent to the suit as evidence unless that party has been confronted with the previous admission relevant on the issue to be decided in the case. When an admission of a party is proved in the case in his presence the attention of that party is obviously drawn to it and if that admission is contrary to the case of that party then it is for that party to explain away that admission or to get rid of it by showing that the admission was untrue. That party can walk into the witness-box and can make a statement as a witness on oath totally inconsistent with the previous statement though without expressly referring to it. The party has, therefore, given evidence the very existence of his previous statement, and in that situation there is nothing further for him to explain. In that event if the party who wishes to place reliance on the previous statement does not confront the witness with that statement and does not give him an opportunity to explain the contradiction between his evidence in Court and that contained in the previous admission then that party cannot make the previous statement legal evidence in the case in view of the provisions of S. 145, Evidence Act. But where the party whose admission has been brought on the record does not go into the witness-box either to deny the admission or to explain it and does not, in the witness-box, take up an attitude inconsistent with the previous admission, then the provisions of S. 145 can have no application and there is no other provision in the Evidence Act which affects the relevancy of admissions as pieces of evidence under the provisions of S. 21, Evidence Act.

Apart from these statutory provisions of the Evidence Act, on general principles of law it seems to me that the same proposition must hold good. An admission made by a party in proceedings antecedent to the suit or in letters and documents executed by him is a valuable piece of evidence against the party making those admissions and must be

available to his adversary if that party during litigation pleads contrary to his own previous admissions. That principle of law, however, ceases to have any application where the party who has made the previous admissions goes into the witness-box and on oath gives evidence flatly inconsistent with what he had stated previous to the suit. Before his opponent can be allowed on the basis of the previous admissions, to argue that the party in the witness-box has perjured himself, it is only fair that he is given an opportunity to explain his strange and inconsistent attitude. In other words, before a man is condemned as a liar, the material on the basis of which that charge is levelled against him must be placed before the witness and he must be confronted with those previous statements which form the basis of the charge of perjury against him. If that is not done, then another principle of law comes into play which excludes the previous statements from being treated as legal evidence on the issue in question, and that principle is that no man should be condemned as a criminal till he is afforded an opportunity to defend himself and that opportunity cannot be offered till his attention is drawn to the matter on which the charge of perjury is laid against him. This principle, however, is inapplicable to the case where nothing has been said directly or indirectly by the witness against his previous statements or admissions and no contradiction is involved in his statement in the witness-box read as a whole of the previous admission made by him. Again, that principle is wholly inapplicable when the party making the previous admissions has not appeared in the witness-box. No question of perjury arises in either of these two situations and, therefore, the principle that to some extent qualifies the general rule that admissions are good form of evidence and are relevant against the party making them has no application in these two latter kinds of cases.

The leading case on the subject and which has been differently interpreted in different cases of the High Courts in India is the case in 39 Bom. 441.³ In that case the question arose as to the factum and validity of the adoption of plaintiff 4. Plaintiff 1 in that case was Bal Gangadhar Tilak, plaintiff 2 was Mr. Khaparde and plaintiff 3 was their colleague in the management of the estate

3. (15) 2 A. I. R. 1915 P. C. 7 : 39 Bom. 441 : 42 I. A. 135 : 29 I. C. 639 (P. C.), Bal Gangadhar Tilak v. Shrinivas Pandit.

of plaintiff 4 whose adoption was the subject-matter of the controversy in that case. The defendant was the person who had set up a rival adoption by the widow subsequent to the adoption of plaintiff 4. The widow who made both the adoptions repudiated the first adoption and stood by the second adoption. The suit was brought by the four plaintiffs to establish, as already indicated, the adoption of plaintiff 4, Shri Jagannath Vasudev Pandit Maharaj. The material issue in the case was whether plaintiff 4 was the validly adopted son of Shri Baba Maharaj. The Subordinate Judge held that the corporeal giving and taking of plaintiff 4 in adoption was proved. He believed the evidence of plaintiffs 1 and 2 and their witnesses and disbelieved the evidence of the defendants and made a decree in favour of the plaintiffs. The defendants appealed to the High Court. The appeal was heard by a Bench of the Bombay High Court presided over by Chandavarker and Heaton JJ. The High Court held that there had not in fact been any corporeal giving and taking of the boy in adoption and that the adoption had been brought about by the undue influence exercised by plaintiffs 1 and 2 over the widow Tai Maharaj. The High Court accordingly reversed the decision of the Subordinate Judge and dismissed the suit. On appeal by the plaintiffs to their Lordships of the Privy Council it was argued *inter alia* that plaintiff 4 was the duly adopted son of the deceased and that the finding of the High Court as to the fact of putting the boy into the lap of the adoptive mother was contrary to the weight of evidence and was founded on inferences drawn from portions of certain documents put in, and the oral evidence of Tilak and Khaparde was disbelieved but the portions of the documents which were sought to discredit their evidence were never shown to them in cross-examination, as should have been done in accordance with the provisions of S. 145, Evidence Act. On the respondents' behalf very eminent and learned counsel appeared and urged that the fact that there was no corporeal giving and acceptance of the boy in adoption, had been rightly held established by the High Court in view of the provisions of ss. 17, 18, 21 and 32, Evidence Act, and that the High Court was entitled to rely on the documentary evidence and to draw inferences from statements in them which justified it in discrediting the evidence of the plaintiffs' and their witnesses. It may be mentioned that the documents relied upon to contradict the evidence of Mr. Tilak and

Mr. Khaparde were certain letters in which expressions had been used which led to an admission on their part that there had been no real giving and taking of the boy in adoption and the adoption was incomplete. From the language employed in these letters and the expressions used therein by plaintiffs 1 and 2 it was inferred that antecedent to the suit they had been admitting the fact that the boy had not been taken into the lap of the adoptive mother and therefore there had been no complete adoption of plaintiff 4 in that suit. The High Court had relied on these admissions as substantive evidence in the case and on their basis had disbelieved the evidence of the two plaintiffs given in Court on the fact of the giving and taking of plaintiff 4 in adoption by the widow. As mentioned above, before their Lordships of the Privy Council the counsel for the respondents specifically drew attention of their Lordships to the provisions of ss. 17 to 21, Evidence Act, and S. 32 of the same Act. On this part of the case Lord Shaw who delivered the Privy Council opinion observed as follows :

"But they must also record their dissent from the view that the use made of these documents in this case was justified by law. On general principle it would appear to be sound that if a witness is under cross-examination on oath he should be given the opportunity, if documents are to be used against him, to tender his explanation and to clear up the particular point of ambiguity or dispute. This is a general, salutary, and intelligible rule and where a witness's reputation and character are at stake the duty of enforcing this rule would appear to be singularly clear.

Fortunately the law of India pronounces in no uncertain sound upon the same matter. By S. 145 Evidence Act, 1872, it is provided that :

'A witness may be cross-examined as to previous statements made by him in writing or reduced into writing, and relevant to matters in question, without such writing being shown to him, or being proved; but, if it is intended to contradict him by the writing, his attention, must before the writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him.'

Their Lordships have observed with regret and with surprise that the general principle and the specific statutory provisions have not been followed. The verdict of the High Court is an inferential verdict none the less sweeping on that account — but an inferential verdict actually of perjury. What are the premises upon which this inference proceeds? In no inconsiderable degree they consist of documents, statements, even turns of expression, which are used to confound the spoken word. Had the safeguards set up by the law with respect to the use of documents been observed? Not at all. Not only have documents been used for the purpose of contradicting witnesses without obeying the injunctions prescribed by law, but the inference thus derived, and improperly derived, from these documents has resulted, as stated, in an inferential verdict of perjury. Heaton J. deals elaborately

with this portion of the case, and one example taken from his judgment will suffice. One letter out of many is taken, passages are cited from it, and a minute argument proceeds as to the expressions used, and why this was mentioned and that other omitted. Mr. Tilak was for five days under cross-examination before the Subordinate Judge; but not one of these things was put to him; and he was not asked in the witness-box to give one single explanation with regard to any of those expressions or omissions which are now alleged to compromise him. On this point of the case no more need be said."

It is clear, therefore, that in spite of the provisions of S. 21, Evidence Act, to which specific reference was made during the arguments of the learned counsel appearing for the respondents, Lord Shaw took the view that those provisions could not make the previous statements and admissions of a party legal evidence in the case unless the general, salutary and intelligible rule of law incorporated in S. 145, Evidence Act, had been followed and the attention of the party who had appeared as a witness in the case was drawn to specific portions of the previous statements made by him which amounted to admissions and went contrary to his spoken word in the witness-box. This case is, therefore, an authority for the proposition that admissions of a party on a material issue in the case made antecedent to the suit cannot be used as legal evidence to pronounce a finding on that issue if the person making the admission has made a statement on oath in the witness-box which is inconsistent directly or indirectly with the previous admission unless that admission is put to him in the witness-box and he is given an opportunity to deny it or to explain it. This case, however, is no authority for propositions Nos. (1) and (2) stated in the earlier portion of this judgment. In other words, this case does not warrant the proposition that an admission made by a party antecedent to the suit is not legal evidence in the case on a material issue in cases where that party has not given evidence as a witness, or for the proposition that even where he has given evidence as a witness he has not made a statement which is in any way directly or indirectly inconsistent with his previous admissions and does not amount to a denial of that admission. As I have already stated, this Privy Council case has been given different interpretations by the High Courts in India. So far as the Punjab Chief Court and this Court are concerned, the course of decisions is consistent with the rule laid down by their Lordships of the Privy Council in 39 Bom. 441³ though the language employed in some of the decisions to some extent is

liable to the interpretation that the rule laid down in this case has been extended to include propositions Nos. (1) and (2) above stated within its ambit.

The first case on this subject is a Bench case of the Punjab Chief Court, 31 P. R. 1903.² In that case it was argued that the statement made by the plaintiffs during mutation proceedings which amounted to admissions on the question of the pedigree-table were relevant pieces of evidence on the question of their relationship. To this an objection was taken that the plaintiffs had not been examined in the case with reference to the former statement and the attested copies filed of the statements of those witnesses did not prove that they had been made. The learned Judges observed that the plaintiffs were parties to the suit and witnesses, and the previous deposition was referred to only as an admission and was relevant as a piece of evidence as the parties had not appeared in the witness-box. This case does not in any way come into conflict with the observations of their Lordships of the Privy Council in 39 Bom. 441.³ Section 145 does not come into play till a party has appeared as a witness and has submitted himself for cross-examination. Nor does the salutary rule laid down by the Privy Council that a person should not be held guilty of perjury without being given an opportunity to explain the statements on the basis of which it is sought to condemn him as a liar come into conflict with the view taken in this case by the Chief Court.

A. I. R. 1927 Lah. 377,⁴ is a Single Bench decision of Dalip Singh J. That case should never have been reported in the Law Reports. It was common ground between the parties in that case that the statement of Sudhan which amounted to an admission had not been proved at all and when the previous admission had not been proved at all question of confronting Sudhan with that statement could not arise at all. The learned Single Judge did not enunciate any proposition of law in this case. 11 Lah. 410,¹ is a Bench decision of this Court in which the following observations were made :

"It is settled law that before a previous admission can be used against a party, it must be put to him, and an opportunity afforded to him to explain it, if it is capable of explanation. This has not been done in these cases."

It is not clear from a perusal of this decision whether the person whose admission was sought to be proved had appeared as a

4. ('27) 14 A. I. R. 1927 Lah. 377 : 102 I. C. 198, *Molar v. Ram Parshad*.

witness in the case or not. Moreover, the remarks made in the case were obiter because it was found that the alleged admissions were contained in plaints of certain antecedent suits, and those plaints or extracts therefrom were not tendered in evidence in the case and were not on the record. These obiter observations are capable of lending colour to the view that even in cases where a party has not appeared in the witness-box it is the duty of the party relying upon that person's previous admissions to put those admissions to him before they can be used as evidence. But it appears to me that when their Lordships employed the expression that "It was settled law that before a previous document can be used against a party, it must be put to him" they were referring to the decision of their Lordships of the Privy Council in 39 Bom. 441.³ If these obiter observations are read in the light of the decision of their Lordships in that case they cannot be considered as laying down a proposition of law that even if a party has not appeared in the witness-box the provisions of S. 145, Evidence Act, must be observed before the previous statements of that party become legal evidence in the case as admissions. 11 Lah. 632⁵ is another Bench decision of this Court. This only follows the obiter observations made in 11 Lah. 410.¹ In this case also it was observed that there was no proof that admissions had been made by Wajih-ud-Din. It is not clear whether Wajih-ud-Din had been examined as a witness in that case. This case again stands on the same footing as the case of *Ghulam Murtaza*.¹

12 Lah. 286,⁶ is a next Bench decision of this Court. The decision in this case is absolutely in accordance with the decision of their Lordships of the Privy Council in 39 Bom. 441.³ The following observations occur at p. 293 of the report :

"Lastly, counsel referred us to admissions alleged to have been made by Barkat Ali in a previous litigation. Of these the one at p. 86 of the paper book is not legal evidence in the case as it was not put to Barkat Ali and he was not examined on it under S. 145, Evidence Act. Sir Muhammad Shafi urged, however, that S. 145 did not apply to an admission made by a party, and that it was not necessary to put such an admission to him *even though he had appeared as a witness at the trial*. In support of this contention he referred us to an observation of Chatterji J. in 31 P. R. 1903,² that it is not necessary to examine a party to a case with reference to a former statement made by him and that the mere filing of an attested copy of

that statement is sufficient to make it legal evidence in the case. The next circumstance in connexion with which this remark was made, cannot be gathered from the report, but if the meaning put upon it by the appellants' learned counsel is correct it is clearly in conflict with the decision of their Lordships of the Privy Council in 39 Bom. 441,³ and cannot be accepted as good law. See also the judgment of Mookerjee J. in 32 I. C. 267.⁷ I hold, therefore, that this alleged admission is not properly before us and cannot be used against the defendants."

In this case Barkat Ali had been examined as a witness and the proposition of Sir Mohammad Shafi to the effect that even if a party had appeared as a witness and made a statement inconsistent with the previous admission that previous admission could be used as legal evidence against that person without his attention being drawn to the previous statement was negatived on the basis of the decision of their Lordships in 39 Bom. 441.³ This case only follows the rule laid down by their Lordships of the Privy Council and is no authority for the proposition that even if a party has not appeared in the witness-box and has made no statement directly or indirectly inconsistent with the previous admission, the previous admission is not relevant evidence till he is confronted with that previous admission. A. I. R. 1934 Lah. 750⁸ is a Single Bench decision of Abdul Rashid J. It follows the bench decision in 12 Lah. 286.⁶ Nothing more need be said about it. A. I. R. 1934 Lah. 753,⁹ is another Bench decision of this Court which also merely follows the decision in 12 Lah. 286.⁶ Bhide J. in 39 P.L.R. 200,¹⁰ also followed 12 Lah. 286.⁶

The Calcutta High Court in 32 I. C. 267,⁷ has taken the same view. This was followed by a Bench of this Court in 12 Lah. 286.⁶ The following observations occur at p. 272 :

"The other statements are admissions by parties to the present suit and might have been used to contradict their testimony in this case under S. 145, Evidence Act. They were, however, not so used. The specific statements were not put to the parties sought to be contradicted. Consequently, as pointed out by the Judicial Committee in 39 Bom. 441³ they cannot be used in evidence. Previous statements, unless used to contradict or discount the evidence of a witness given in the suit, cannot be legitimately used, and even the particular matter or point must be placed before the witness as one for explanation in view of its discrepancy with the evidence tendered."

7. ('16) 3 A. I. R. 1916 Cal. 110 : 32 I. C. 267, Upendra Nath v. Bhupendra Nath.

8. ('34) 21 A.I.R. 1934 Lah. 750 : 154 I. C. 662, Daulat Shah v. Bishan Das.

9. ('34) 21 A.I.R. 1934 Lah. 753 : 155 I. C. 819, Secretary of State v. Akbar Shah.

10. ('36) 39 P.L.R. 200, Ude Bhan v. Daulat Ram.

5. ('30) 17 A. I. R. 1930 Lah. 714 : 11 Lah 632 : 125 I. C. 893, Shafiq-ud-Din v. Mahbub Elahi.

6. ('30) 17 A. I. R. 1930 Lah. 695 : 12 Lah. 286 : 125 I. C. 886, Muharram Ali v. Barkat Ali.

Here again a reference was made to S. 145, Evidence Act. That section has only application to a case where a party has appeared in the witness-box and has been cross-examined. The section has absolutely no relevancy to the case of a person who has not appeared in the witness-box and made any statement directly or indirectly inconsistent with his previous admissions. Two cases of the Madras High Court were cited. 5 Mad. 239,¹¹ is a case similar to the one in 31 P. R. 1903,² and needs no further comment. The second case, 53 Mad. 952,¹² is a case similar to 12 Lah. 286⁶ and also needs no comment. There are, however, two Patna cases which require consideration. A.I.R. 1934 Pat. 55,¹³ is a Single Bench decision of Wort J. In that case he made the following observations :

"Then the deposition (Ex. F.) of the appellant was used to contradict his present case. Section 145, Evidence Act, makes it necessary to put this document to the witness. This procedure was not adopted for the simple reason that he did not go into the witness-box, but that does not entitle the Court to break the law. There was one way only of using this document; as it could not be used in that way in the circumstances it was as I have said inadmissible."

I have not been able to discover any provision of the Evidence Act apart from S. 145 which makes it obligatory on a party to put a previous admission of that party to him, and S. 145 only has application when that party has given evidence as a witness and has made a statement inconsistent with the previous statement on which he can be cross-examined. So far as I am able to see, if an admission is proved against a party and his attention has been drawn to it (it must be taken that his attention was drawn when in his face the other party has proved that admission) then it is the duty of the party as a party to that case to explain that admission, and if he does not go into the witness-box the law casts no duty on the opposite party to call him there and to confront him with his previous admission. It is only in cases where the party goes into the witness-box and makes a statement inconsistent with the previous statement that a duty is cast by the provisions of S. 145, Evidence Act, on his opponent to confront him with his statement inconsistent with the statement made in Court, and if he does not

do it at that stage then those previous statements can no longer be used as legal evidence to contradict his evidence. In my judgment, the learned Single Judge, and I speak with great respect, made observations which cannot be justified on the language of S. 145 on the basis of which these observations were made. A.I.R. 1936 Pat. 588,¹⁴ is another Bench decision of the Patna High Court, and the observations in this case, in my view, go to the other extreme. At p. 589 of the report the following observations occur :

"While the defendant was under cross-examination a document was tendered to him, an affidavit which he had sworn in November of 1930. He admitted his signature on this affidavit which was then marked as an exhibit. Mr. Sushil Madhab Mullick argues that the statements contained in this affidavit ought not to have been used as evidence against the Mahant unless his attention had been specifically drawn to them when he was in the witness-box. Section 145, Evidence Act, provides that the evidence of a witness may be contradicted by the production of a previous statement made in writing; but before such statements can be used to contradict his evidence his attention must be drawn specifically to the statements which are to be so used. Mr. Mullick draws attention to the decision of the Privy Council on this point in 39 Bom. 441.¹ In that case various letters written by the plaintiff had been produced in evidence, in order to contradict the evidence given by the plaintiff at the trial, which had led the High Court of Bombay to believe that the plaintiff in his evidence had committed perjury. Lord Shaw commented on the failure to observe the provisions of S. 145, since these documents had been produced for the purpose of contradicting the evidence which had been given by the plaintiff.

In the present case it does not appear to us that the provisions of S. 145, Evidence Act, apply to this admission at all. This is not a document which becomes relevant by the provisions of S. 145, Evidence Act, and would otherwise be inadmissible. It is an admission which goes to the root of the case, which is relevant under S. 21, Evidence Act : and its relevancy is not affected by the question of whether the defendant may or may not have given evidence consistent with the statement contained in it. If it had been a document which had no relevancy apart from the fact that it contradicted statements made by the defendant when he was in the witness-box, it would have been necessary to observe strictly the provisions of S. 145 before the document could be used; but it was not a document of that nature and no irregularity was committed in the manner of admitting it into evidence and in the use which was made of it after it was admitted."

It appears to me that these observations were made by their Lordships, I speak with great respect, under some misapprehensions as to the Privy Council decision in 39 Bom. 441.³ As already pointed out, in that case, in spite of specific reference to S. 21, Evidence Act, their Lordships held that ad-

11. ('82) 5 Mad. 239, *Ali Moidin Ravuthan v. Elayachanidathil Kombi Achen*.

12. ('31) 18 A.I.R. 1931 Mad. 207 : 53 Mad. 952 : 129 I. C. 463, *Nanduri Saradamba v. Pattabhiramayya*.

13. (34) 21 A.I.R. 1934 Pat. 55 : 150 I. C. 841, *Gajadhar Tewari v. Nand Lal*.

14. ('36) 23 A.I.R. 1936 Pat. 588 : 165 I. C. 805, *Ramkeshwar Das v. Baldeo Singh*.

mission relevant under S. 21 could not be used as legal evidence unless the procedure laid down in S. 145, Evidence Act, was complied with. That, in substance though not in clear language, is the verdict of their Lordships of the Privy Council. This case, therefore, runs counter to that decision and to that extent cannot be held to be good law. The principle on which their Lordships decided 39 Bom. 441³ comes into clear conflict with this decision. Reference was also made by counsel to an Oudh decision in A. I. R. 1935 Oudh 41.¹⁵ That case is like the one that was decided by this Court in 12 Lah. 286.⁶ These are all the decided cases on the point that has been referred to this Full Bench. The matter has been discussed by Mr. Munir (now Munir J.) in his valuable work on the law of Evidence. At pp. 137-138 of the book certain observations were made by the learned author which, I speak with great respect, appear to have been made owing to some misapprehensions as to the facts on which their Lordships of the Privy Council gave decision in 39 Bom. 441.³ The rule, therefore, that the learned author has laid down is not absolutely correct when it states that it is not necessary to put to a party an admission made by him when called as a witness even when he makes a statement in the witness-box inconsistent with the admission, and that without this confrontation the admission is relevant evidence. The view of the learned author is in accord with the view taken in A. I. R. 1936 Pat. 588,¹⁴ and, in my judgment, goes against the rule laid down by their Lordships of the Privy Council in 39 Bom. 441.³ For the reasons given above I would answer the question referred to the Full Bench in the following terms :

(1) A party's previous admission is relevant under S. 21 and can be used as evidence against him if that party has not appeared in the witness-box at all. The value of that admission as a piece of evidence depends on the circumstances of each case but ordinarily an admission is a valuable piece of evidence.

(2) An admission is a relevant piece of evidence and can be used as legal evidence against a party even in cases where the party appears in the witness-box but makes no statement inconsistent or contradictory to that admission and a denial of that admission is not involved in the statement

made by the party in the witness-box by considering the statement as a whole. In this case there is no conflict between the sworn word in Court and the previous admission and the case is, therefore, outside the ambit of S. 145, Evidence Act, and therefore it follows that it is outside the rule laid down by their Lordships of the Privy Council in 39 Bom. 441.³

(3) A previous admission of a party who has gone into the witness-box on the point in issue and in the witness-box has made a statement inconsistent with the admission or the statement made in the witness-box is such which involves a denial of the previous admission or runs counter to that admission then the previous admission cannot be used as legal evidence in the case against that party unless the attention of the witness during cross-examination was drawn to that statement and he was confronted with specific portions of that statement which were sought to be used as admissions. Without complying with the procedure laid down in S. 145, the admission contained in the previous statement cannot be used as legal evidence against that party.

The case will now go back to the Division Bench for the decision of the first appeal in view of the answer given above to the question referred by the Division Bench for the decision of the Full Bench.

Beckett J. — I agree.

Teja Singh J. — I agree.

V.R./D.H.

Reference answered.

[Case No. 20.]

A. I. R. (33) 1946 Lahore 73

ACHHRU RAM J.

S. Nand Singh — Decree-holder —

Appellant

v.

Rahmat Din (minor) and others —

Judgment-debtors — Respondents.

Execution Second Appeal No. 1148 of 1943, Decided on 18th April 1945, from order of Dist. Judge, Rawalpindi, D/- 24th February 1943.

(a) Civil P. C. (1908), S. 11 — Finding based on agreement or admission of party can operate as *res judicata* — Mortgage suit — Compromise sale decree passed against mortgagor on assumption that mortgagor did not belong to agricultural tribe — Mortgagor precluded by *res judicata* from pleading in execution that he belonged to agricultural tribe.

An implied finding based on an agreement or admission by a party operates as *res judicata* in the subsequent suit in the same way as a finding based on an adjudication by the Court. [P 76 C 1]

15. ('35) 22 A.I.R. 1935 Oudh 41 : 10 Luck. 423; 152 I. C. 1042, Latafat Hussain v. Onkar Mal.

The point to be considered in deciding a question of *res judicata* is whether the judgment in the previous case could be sustained without the determination of the question at issue in the subsequent suit, even though the subject-matters of the two suits are different. If the judgment in the previous suit could not be sustained without the determination of the question in the subsequent suit the previous decision operates as *res judicata* and bars the subsequent suit. [P 76 C 1, 2]

Where in a mortgage suit a distinct issue is raised as to whether the mortgagor was a member of an agricultural tribe and whether the mortgage contravenes the provisions of the Punjab Alienation of Land Act and in a compromise, the mortgagor agrees to a decree for sale being passed against him on the assumption that the mortgage in the suit was perfectly valid and did not contravene the provisions of the Punjab Alienation of Land Act, the judgment-debtor is precluded, by reason of the operation of the rule of *res judicata*, from pleading that he belonged to the agricultural tribe and therefore the mortgaged land was immune from sale in execution of the consent decree: (1895) 1 Ch. 37 and 63 Cal. 550, *Rel. on.*

[P 75 C 2 ; P 76 C 2]

C. P. C. —

(44) Chitaley, S. 11, N. 33 and N. 114.

(41) Mulla, Page 84.

(b) Evidence Act (1872), S. 115 — Rule that there can be no estoppel against statute does not imply that there can be no estoppel against plea of fact necessary to be established before statute can be invoked.

It is quite true that there can be no estoppel against a statute but this rule does not imply that there can be no estoppel even against a plea of a fact which has to be established before the application of the statute can be invoked. A man may not estop himself by any conduct of his from pleading that an alienation made by him is in contravention of a provision of the Punjab Alienation of Land Act. He may, however, estop himself by such conduct from pleading that he is a member of a tribe to which protection is afforded by the Act. [P 76 C 2]

(c) Punjab Alienation of Land Act (13 [XIII] of 1900), S. 16 — Decree directing sale of agricultural land — Executing Court whether can refuse to sell (*Quære*).

Where the decree directs sale of agricultural land, can the executing Court refuse to sell such land on the ground that the sale is prohibited by S. 16, Punjab Alienation of Land Act : *Case law referred.* [P 76 C 2 ; P 77 C 2]

Harbans Singh — for Appellant.

Ghulam Haidar Shah — for Respondents.

Judgment. — This appeal has arisen under the following circumstances. On 13th March 1924 one Sher Mohammad son of Gohar, describing himself as of the Behl Bhatti tribe, mortgaged 10 *kanals* and 12 *marlas* of agricultural land and two houses situate in the village Janda Chechi, and a tonga and a mare to Ganesh Das and Nand Singh for a sum of Rs. 2666. After the death of the aforesaid Sher Mohammad, Nand Singh mortgagee and Mohan Lal, a son of

Ganesh Das, the other mortgagee, brought a suit for the recovery of a sum of Rs. 5000 by sale of the mortgaged land and houses against Qudrat Ilahi and Rehmat Din his minor sons Fazal Din being appointed their guardian *ad litem*. The suit was resisted *inter alia* on the plea that Sher Mohammad mortgagor was a Bhatti Rajput and therefore a member of an agricultural tribe in Rawalpindi district, and that the mortgage being in contravention of the Punjab Alienation of Land Act could not be enforced and no decree for the sale of the land covered by it could be passed. A specific issue was framed as to the mortgage in suit being in contravention of the provisions of the Punjab Alienation of Land Act. The position taken up by the plaintiffs was that the mortgagor was not a Bhatti Rajput but a Bhatti Behl which signified a tribe different from Rajputs, and not one of the notified agricultural tribes of the district. After some evidence had been led by the parties on the several issues framed, the guardian *ad litem* of the minor defendants compromised with the plaintiffs after obtaining necessary sanction from the Court. According to the terms of the compromise 3 *kanals* and 15 *marlas* of land, being one half of a holding of 7 *kanals* and 10 *marlas* owned jointly by the mortgagor and another person, and one of the two houses were released from the mortgage charge and a decree for the sum claimed by sale of the remaining mortgaged property was passed in the plaintiffs' favour. When the decree-holders sued out execution of this decree Fazl Din, the guardian *ad litem* of Rehmat Din judgment-debtor, Qudrat Ilahi, the other judgment-debtor, having died in the meantime, resisted the execution on the ground that the judgment-debtor being a member of an agricultural tribe the sale of his land was prohibited by S. 16, Punjab Alienation of Land Act. Objection was also taken to the sale of the house on the ground of its being not liable to sale by reason of the provisions of S. 60, Civil P. C., as amended by the Punjab Relief of Indebtedness Act. The executing Court overruled both the objections raised on behalf of the judgment-debtor. In respect of the objection to the sale of the house it held that S. 60, Civil P. C., as amended by the Punjab Relief of Indebtedness Act did not give any exemption to houses specifically mortgaged. In respect of the agricultural land it was held that in view of the compromise decree the plea as to the judgment-debtor being a member of an agricultural tribe was barred by the rule

of *res judicata*, and that in any case the judgment-debtor was estopped from raising that plea. It was further held that the decree itself having directed the sale of the land the executing Court could not go behind the decree and refuse to sell it. The judgment-debtor being dissatisfied with this order of the executing Court went up in appeal to the District Judge. The learned District Judge was of the opinion that the plea of the judgment-debtor as to his being a member of an agricultural tribe was not barred by the rule of *res judicata*. He further held that a consent given by the judgment-debtor to the sale of his property could not affect the operation of the statutory prohibition against the sale of the agricultural land belonging to a member of an agricultural tribe. On the question of fact, whether a judgment-debtor or his father was a member of an agricultural tribe, he did not give any finding although he appears to have assumed that they were members of such a tribe. Holding that the decree for sale did contravene the provisions of the Punjab Alienation of Land Act he allowed the judgment-debtor's appeal and remanded the case to the executing Court with the direction that it should stay further proceedings so far as the land was concerned and should bring the decree to the notice of the Collector as laid down in S. 21A, Punjab Alienation of Land Act. In respect of the house the learned Judge held that the executing Court was debarred from going into the question whether it was liable to sale under the law and was bound to give effect to the decree directing the sale. The decree-holder has come in second appeal to this Court.

It appears that in pursuance of the direction given by the learned District Judge the executing Court did bring the matter to the notice of the Deputy Commissioner of Rawalpindi who has filed a petition for revision of the mortgage decree in this Court. I understand that on that petition for revision coming up for hearing a learned Single Judge of this Court adjourned it with a verbal direction that the petition might be linked up with the present appeal. However, this appeal has been set for hearing without the petition for revision. It was suggested to me by the learned counsel for the respondent that the hearing of this appeal might be postponed to enable the office to put up the petition for revision for hearing along with the appeal. I did not see my way to accept this suggestion because in my judgment the two cases are to be dealt with and

decided on wholly different considerations and, therefore, no useful purpose can be served by the two being heard together. In this appeal the principal question is whether by reason of the operation of the rule of *res judicata* and of estoppel the judgment-debtor is not precluded from pleading that he is a member of an agricultural tribe and, therefore, the agricultural land belonging to him is immune from sale in execution of the decree. If I decide this question in favour of the decree-holder no further question will arise in this case and the executing Court will be bound to sell the land so long as the mortgage decree stands. In the petition for revision the Deputy Commissioner may be entitled to impugn the compromise decree itself and may not be affected by the rule of *res judicata* or that of estoppel. In that case, therefore, a further enquiry into the question of the tribe to which the mortgagor belonged may become necessary. The question that arises for decision in the appeal is whether the order made by the learned District Judge in the appeal filed by the judgment-debtor is correct, whereas the question in the petition for revision is whether the decree of 20th July 1938 was correctly passed.

After hearing the learned counsel for the parties, I am of the view that the learned District Judge is wrong in holding that the compromise decree did not operate as *res judicata* and did not preclude the judgment-debtor from pleading that he was a member of an agricultural tribe and that accordingly the land belonging to him was immune from sale. As pointed out above, in the mortgage suit a distinct issue was raised as to whether the mortgagor was a member of an agricultural tribe and whether the mortgage of the suit land contravened the provisions of the Punjab Alienation of Land Act. By the compromise the defendants abandoned the plea that had given rise to this issue and agreed to a decree being passed on the assumption that the mortgage in suit was a perfectly valid mortgage, having been effected by a person who was not a member of an agricultural tribe and did not contravene any provision of the Punjab Alienation of Land Act. The decree for sale of the suit land or any portion thereof could not have been passed except on a finding in the plaintiffs' favour on the issue as to the validity of the mortgage and as to its being in contravention of the provisions of the Alienation of Land Act. A finding on this issue in the plaintiffs' favour must, there-

fore, be regarded as implicit in the decree eventually passed. The mere circumstance that this implied finding was based not on an adjudication by the Court but on an agreement or admission by the defendant cannot make any difference in so far as the operation of the principle of *res judicata* is concerned. In (1895) 1 Ch. 37¹ Vaughan Williams J. made the following observations at p. 45 of the report in dealing with the effect of a judgment obtained on consent:

"It has always been the view that a judgment by consent or by default raises an estoppel just in the same way as a judgment after the Court has exercised a judicial discretion in the matter. The basis of the estoppel is that, when parties have once litigated a matter, it is in the interest of the estate that litigation should come to an end, and if they agree upon a result, or upon a verdict, or upon a judgment, or upon a verdict and judgment, as the case may be, an estoppel is raised as to all the matters in respect of which an estoppel would have been raised by judgment if the case had been fought out to the bitter end."

On appeal the judgment of Vaughan Williams J. was upheld. Lord Herschell in delivering the judgment of the Court of appeal made the following observations on this subject at page 50.

"The truth is, a judgment by consent is intended to put a stop to litigation between the parties just as much as is a judgment which results from the decision of the Court after the matter has been fought out to the end. And I think it would be very mischievous if one were not to give a fair and reasonable interpretation to such judgments: *and were to allow questions that were really involved in the action to be fought over again in a subsequent action.*"

A Division Bench of the Calcutta High Court in 63 Cal. 550² held that a decree passed by consent is as effective a bar to a subsequent suit as one passed on contest, not only with reference to the conclusions arrived at in the previous suit, but also with regard to every step in the process of reasoning on which the said conclusions are founded. In explaining the words "every step in the process of reasoning" the Bench made the following observations:

"When we say 'every step in the reasoning' we mean the findings on the essential facts on which the judgment or the ultimate conclusion was founded. In other words the finding which it was necessary to arrive at for the purpose of sustaining the judgment in the particular case will operate as estoppel by judgment."

It was further pointed out that the point to be considered in deciding a question of *res judicata* is whether the judgment in the

previous case could be sustained without the determination of the question at issue in the subsequent suit, even though the subject-matters of the two suits are different. If the judgment in the previous suit could not be sustained without the determination of the question in the subsequent suit the previous decision operates as *res judicata* and bars the subsequent suit. The consent decree in the mortgage suit could not be sustained without the determination of the question of the tribe to which the mortgagor belonged. That decree must, therefore, operate as *res judicata* in any subsequent litigation between the same parties, or parties claiming through or under them, and the more so in proceedings arising out of an application made for the execution of that very decree.

Apart from the question of *res judicata* I am of the view that the finding on the question of estoppel given by the learned trial Judge, which has been simply overlooked by the learned District Judge, is also perfectly sound and correct. It is quite true that there can be no estoppel against a statute but, I do not see that this well recognized rule implies that there can be no estoppel even against a plea of a fact which has to be established before the application of the statute can be invoked. A man may not estop himself by any conduct of his from pleading that an alienation made by him is in contravention of a provision of the Punjab Alienation of Land Act. He may, however, estop himself by such conduct from pleading that he is a member of a tribe to which protection is afforded by the Act. In the present case the defendant secured the release of 3 *kanals* and 15 *marlas* of land and of one out of the two mortgaged houses from the mortgage by abandoning his plea as to his being a member of the Bhatti Rajput tribe and by impliedly accepting the contention of the plaintiffs as to his being a weaver. In agreeing to the release of the house, in any case, the mortgagees acted very much to their detriment and it is not possible to restore *status quo ante* now.

On the question whether in a case where the decree directs sale of agricultural land the executing Court can refuse to sell such land on the ground of the sale being prohibited by S. 16, Punjab Alienation of Land Act, the authorities in this Court are by no means uniform. Before 1933 it had been consistently held that the executing Court cannot refuse to sell such land. In A. I. R. 1933 Lah. 397³

3. ('33) 20 A.I.R. 1933 Lah. 397 : 141 I. C. 634, Thakur Das v. Roshan Din.

1. (1895) 1 Ch. 37 : 71 L. T. 594 : 43 W. R. 131, In re South American and Mexican Company ; Ex parte bank of England.

2. ('36) 63 Cal. 550, Secretary of State v. Atendranath Das.

Addison and Agha Haidar JJ. took a contrary view. This was followed in some later decisions. However, in I. L. R. (1941) 22 Lah. 1,⁴ there are observations which throw very considerable doubt on the correctness of this view, indeed if they do not actually overrule it. The point that arose for decision in that case was undoubtedly different. What happened there was that, subsequent to a mortgage decree for the sale of the land mortgaged by a person who was admittedly not a member of an agricultural tribe, the equity of redemption was purchased by one who was a member of an agricultural tribe and who subsequently resisted the sale in execution of the mortgage decree by invoking the help of S. 16, Punjab Alienation of Land Act. The Full Bench overruled his contention. The main ground on which the judgment of the Full Bench was based was that the mortgage, the validity whereof was admittedly not open to question, carried with it the right to have the property sold for the realisation of the mortgage-debt in case the same was not otherwise paid; and that the right which accrued to the mortgagee at the time of the mortgage could not be affected or taken away by any subsequent disposition of the equity of redemption by the mortgagor. However, in dealing with this matter, the learned Judges also made a general observation as to the incompetency of an executing Court to refuse to sell the property where the decree itself had directed such sale, and Bhide J. in his judgment expressly dissented from A.I.R. (1933) Lah. 397³ and another case reported in I.L.R. 1937 Lah. 48⁵ in which the same view of law had been taken, and this in spite of the fact that his Lordship himself had followed A. I. R. 1933 Lah. 397³ in two Single Bench cases decided by him before that. In 43 P. L. R. 646,⁶ also there are some observations which seem to throw doubt on the correctness of the view taken in A. I. R. 1933 Lah. 397,³ though that judgment, or those in which it was followed, were not referred to and though the question actually arising for decision was different.

In this state of the authorities, the question whether A. I. R. 1933 Lah. 397³ and other

judgments which were based on it have not been overruled by the Full Bench in I. L. R. (1941) 22 Lah. 1⁴ and the question whether, if not overruled by the aforesaid Full Bench judgment, they lay down good law may have to be considered by a larger Bench in the near future. However, in view of the decision given by me on the question of *res judicata* and estoppel this question does not arise in the present case. A. I. R. 1933 Lah. 397³ and other judgments following that authority proceed on the assumption that the judgment-debtor either on the face of the decree was a member of an agricultural tribe or was otherwise admitted to be a member of such a tribe. None of them is an authority for the view that it is open to the judgment-debtor for the first time in execution proceedings to ask for an enquiry into the question whether he is a member of an agricultural tribe in a case where he is not admitted to be so. To allow such an enquiry by the executing Court would be in utter disregard of the provisions of S. 11, Civil P. C. It is obvious that the defendant in such a case could at the stage of the trial plead the invalidity of the mortgage on the ground of his being a member of an agricultural tribe and if he had successfully raised that plea he could certainly have defeated the suit for sale. A plea as to the invalidity of the mortgage would at any subsequent stage of the proceedings obviously be barred by the principle of constructive *res judicata* in case he refrained from raising it at the trial stage and by the rule of *res judicata* if he raised it but either abandoned it later or it was actually decided against him. As I have held the judgment-debtor to be precluded by the rule of *res judicata* as well as by that of estoppel from pleading that he was a member of an agricultural tribe, the question whether the executing Court could refuse to sell the property by reason of the provisions of S. 16 does not arise. For the reasons given above I accept this appeal and setting aside the order of the learned District Judge restore that of the executing Court and remit the case to that Court for decision according to law. No order as to costs.

V.B.

Appeal allowed.

4. ('40) 27 A.I.R. 1940 Lah. 370 :I.L.R. (1941) 22 Lah. 1 : 191 I. C. 10 (F. B.), Punjab National Bank Ltd. Ferozepore City v. Ram Karan-Ramji Lal.

5. ('36) 23 A.I.R. 1936 Lah. 845:ILR (1937) Lah. 48 : 165 I. C. 243, Chhaju Ram v. Muzaffar Ahmad.

6. ('42) 29 A.I.R. 1942 Lah. 14 : I. L. R. (1942) Lah. 464 : 198 I. C. 28 : 43 P.L.R. 646, Raju v. Mangla.

[Case No. 21.]

A. I. R. (33) 1946 Lahore 78

ACHHRU RAM J.

Shah Nawaz — Plaintiff — Appellant
v.*Ghulam Mohammad and another, De-
fendants and others, Plaintiffs —
Respondents.*

Second Appeal No. 74 of 1944, Decided on 19th July 1945, from order of Senior Sub-Judge, Gurdaspur, D/- 4th November 1944.

Civil P. C. (1908), O. 23, R. 3 — Adjustment — Agreement to be bound by oath of opposite party does not amount to adjustment of suit — On refusal by opposite party to take oath, suit must not be decreed but decided on merits.

To amount to an adjustment the agreement or the compromise must be capable of being embodied in a decree forthwith. Any agreement providing for a decree one way or the other being passed in future on the happening or not happening of a certain contingency cannot in law be regarded as an adjustment. Thus, an agreement between the parties to a suit for its being decided in favour of the defendant or the plaintiff according as the defendant did or did not take oath on the Holy Quran in the mosque does not amount to adjustment within the meaning of O. 23, R. 3: 4 Mad. H. C. R. 422; 2 Mad. 356 and 14 All. 141, *Rel. on.* [P 79 C 1, 2; P 80 C 1]

On the refusal of the defendant to take the oath, the suit must not be decreed merely on the strength of that refusal. The Court must decide the suit in accordance with law and on merits: 4 Mad. H. C. R. 422 and 31 Mad. 1, *Rel. on.* [P 80 C 2]

C. P. C. —

('44) Chitale, O. 23 R. 3, N. 10.

('41) Mulla, Page 968.

*Shamair Chand — for Appellant.**Mela Ram Aggarwal — for Respondents.*

Judgment. — This second appeal has arisen under the following circumstances. Shah Nawaz appellant and Bahadur Ali and Nur Mahi respondents 3 and 4 brought a suit against Ghulam Mohammad and Hassan Mohammad respondents 1 and 2 for issue of a mandatory injunction directing the aforesaid defendants to remove the walls A, B and C constructed by them in what was alleged to be a village pathway, indicated as such in the plan accompanying the plaint, and for a perpetual injunction restraining them from causing any obstruction to the aforesaid pathway in future. The suit was resisted by the defendants on a number of pleas. On 1st July 1943, issues were framed and the case was adjourned to 21st August 1943 for the evidence of the parties. On 21st August defendant 1 made a statement to the effect that if the plaintiffs agreed, he would take oath on the Holy Quran in the village mosque and state that his house in dispute marked by the letters A and B in the plan

had been in existence in that form for over twelve years, that on his giving that evidence on oath the plaintiffs' suit should be dismissed, and that in case he did not take the oath proposed by himself, the plaintiffs' suit should be decreed, parties being left to bear their own costs in either case. Defendant 2 agreed to abide by the oath proposed by defendant 1 and made a statement accepting as correct and binding on himself what had been stated by his co-defendant. The plaintiffs also made a statement agreeing to the case being decided according to the statement of defendant 1 and according to the oath proposed by him. The learned Subordinate Judge appointed a local pleader as a Commissioner for the purpose of giving oath to defendant 1. 27th August 1943 was fixed as the date for giving the oath and 30th August 1943 was fixed as the date for hearing in Court. On 25th August 1943 defendant 1 presented an application to the presiding officer of the Court wherein he stated that the members of his brotherhood took very strong exception to his taking oath by the Holy Quran in the mosque and threatened to excommunicate him in case he took the oath which was considered by them to amount to a sacrelege. He accordingly sought to be allowed to resile from his agreement to have the case decided on oath and wanted it to be decided on the merits after recording evidence. The application was accompanied by an affidavit. The learned Judge had a local enquiry made as to the truth of the allegations contained in the application.

On receiving a report to the effect that although some persons of the brotherhood of the parties did object to defendant 1 taking the proposed oath, their opposition appeared to have been engineered by the said defendant himself, and that there was no such general opposition to the taking of the oath as was alleged by the defendant, the learned Subordinate Judge refused to accede to defendant 1's request to be permitted to resile from his agreement, and on 15th October 1943, decreed the plaintiffs' suit on the ground of the aforesaid defendant having persisted in his refusal to take the oath. On an appeal by defendants 1 and 2 the learned Senior Subordinate Judge set aside the decree passed by the trial Court and remanded the case to that Court for decision on the merits. The plaintiffs have come up in appeal to this Court.

On behalf of the respondents a preliminary objection was taken to the competency of the

appeal on the ground that the order passed by the trial Court was in effect and in substance one recording an adjustment, that the decree passed by it was merely in the terms of the adjustment to which it gave effect, that the appeal to the learned Senior Subordinate Judge was really an appeal from the order recording the adjustment and not from the decree which being a decree by consent was not appealable, and that no second appeal lay from an order passed on appeal recording or refusing to record an adjustment. This objection of the learned counsel for the respondents would have had force if the order made by the learned trial Judge on 15th October 1943 could be regarded as an order recording an adjustment. However, after considering the matter very carefully, I am unable to hold that the aforesaid order was an order of that nature. The adjustment contemplated by O. 23, R. 3, Civil P. C., is an adjustment of the suit by any lawful agreement or compromise. To amount to an adjustment the agreement or the compromise must be capable of being embodied in a decree forthwith. Any agreement providing for a decree one way or the other being passed in future on the happening or not happening of a certain contingency cannot in law be regarded as an adjustment.

In an analogous case, the Madras High Court in 4 Mad. H. C. R. 422¹ held that in order that the agreement between the parties to a suit should amount to an adjustment of the suit, the parties should agree upon some terms respecting the subject matter of the suit, which are capable of being embodied in a decree, whereby the suit would be disposed of; and that where what decree should be passed would depend upon the result of an enquiry whether subsequent to the agreement certain acts had or had not been performed, the suit cannot be held to have been adjusted by the agreement and the decree passed in such a case cannot be regarded as a decree passed by consent. The learned Judges were in that case dealing with S. 98, Civil P. C., then in force which was identical in terms with O. 23 R. 3 of the present Code. In 2 Mad. 356² where the suit had been decreed on evidence given on oath by one of the parties in pursuance of an agreement arrived at between them for the case being decided on oath, it was held that the agreement to have the suit decided according to oath of

one of the parties did not amount to an adjustment of the suit and that unless subsequent to the administering of the oath, the parties had consented to the decree being passed in accordance with the oath, the suit could not be deemed to have been adjusted and the decree could not be regarded as one giving effect to the adjustment. The earlier ruling reported in 4 Mad H. C. R. 422¹ was followed. In 14 ALL. 141³ the parties agreed that if upon a particular bond in the possession of a witness for the plaintiff it should be stated that the money was received through the defendant, the Court should decree the suit but otherwise the suit should be dismissed. It was held that the agreement was not an adjustment or compromise of the suit because upon the agreement as it stood the Court could pass no decree, and that something else had to be done before a decree one way or the other could be passed.

It has no doubt been held in some cases that where the parties to a suit agree to accept any statement to be made by a third party as binding on themselves on which a decree should be passed in favour of one party or the other, the suit can be deemed to have been adjusted on a statement being made by the referee. However, these judgments are of no assistance to the respondents and do not in any way run counter to the principle laid down in the judgments of the Madras and the Allahabad High Courts referred to above because in them the suits were held to have been adjusted not by the agreements to be bound by the statements of the third parties but on statements by such parties having been actually made pursuant to these agreements. On such statements being made, the Court could at once proceed to pass a decree one way or the other and nothing further remained to be done by it to be able to pass a decree. The statements of the referees, therefore, did have the effect of adjusting the suits as contemplated in the judgments noticed above.

For the reasons given above I hold that there was no adjustment of the suit by the agreement between the parties, for its being decided in favour of one party or the other according as one of the defendants did or did not take, the proposed oath, and that the decree passed by the trial Court in the plaintiffs' favour on the ground of the said defendant not having taken the proposed oath could not be regarded as a decree

1. ('69) 4 Mad. H. C. R. 422, Konnapalen Uthachadayan v. Ramen Mambiar.

2. ('80) 2 Mad. 356, Vasudeva Shanbog v. Naraina Pai.

3. ('92) 14 All. 141, Muhammad Zahur v. Cheda Lal.

passed as a result of an adjustment. The preliminary objection raised by the learned counsel for the respondents is, therefore, without force and must be repelled. On the merits, however, the appeal must fail. After a Court of law has become seized of a suit, such suit must be decided in a manner permitted by the law. If the parties go to trial, the suit has got to be decided on the merits according to the evidence produced by the parties, and the responsibility for such decision must in every case rest on the Court. The law, however, allows a plaintiff to withdraw the suit or to make default in the prosecution of the suit and in either of the two cases it provides for the dismissal of the suit. The law also provides for the defendant admitting the plaintiff's claim and confessing judgment, in which case the admission of or the confession is taken as conclusive proof of the plaintiff's claim and a decree has to be passed by the Court on the basis of the admission or the confession of judgment. The law also allows the parties to adjust the suit by means of any lawful agreement or compromise and if the parties do make a lawful agreement or compromise which amounts to an adjustment of the suit, as explained above, the Court has to pass a decree giving effect to such adjustment and in terms of the agreement of the compromise.

Further the Oaths Act provides for any party to, or witness in, any judicial proceeding offering to give evidence on oath or solemn affirmation in any form common amongst, or held binding by, persons of the race or persuasion to which he belongs, and not repugnant to justice or decency, and not purporting to affect any third person, and for any party to such judicial proceeding offering to be bound by any such oath or solemn affirmation. In a case of this type, the evidence so given is to be regarded as conclusive or the matter stated as against the person who offered or agreed to be bound by it and the Court will pass a decree such as the proof of the fact stated will justify. The Act, however, does not provide for any decree being passed against a party who having once agreed to take the proposed oath, subsequently resiles from the agreement. Except in the cases mentioned by me where the Civil Procedure Code itself or some other statute provides for the suit being decided in a particular manner, it has got to be decided by the Court seized of it on the merits. In 37 Mad. 408⁴ the law on the

subject was thus stated by a Division Bench of the Madras High Court :

"The ordinary rule is that, when the Court is 'seized' of a case, it has jurisdiction to decide it in the manner prescribed by law, and that parties have no right to interfere with its authority to do so. There are, no doubt, well understood exceptions to this rule, but where the exceptions do not apply, the rule must prevail. Notwithstanding the pendency of a suit, the parties may settle their disputes as they like by any lawful arrangement, and the Court is then bound to give effect to the settlement. Again, they may ask the Court to refer the questions in dispute to an arbitrator, in which case though the decision of the cause is primarily transferred to another tribunal, the Court still retains some control over the proceedings. The parties may also enter into agreement making the oath of one of them conclusive evidence of all or any of the facts in issue between them. This again is subject to the control of the Court.

* * * *

Our attention is not drawn to any rule or principle which would compel a party to adhere to any agreement by him that the suit may be decided in a manner different from that prescribed by law."

In 52 I. C. 619⁵ another Bench of the Madras High Court held to the same effect. An agreement by a party that the suit may be decided against him in case he fails to take a certain oath is not one of the exceptions engrafted by the law on the general rule as to a Court having to decide the suit in accordance with law and on the merits. I have already held that such an agreement cannot amount to an adjustment of the suit and it is not covered by any of the other well recognized exceptions to the rule. In 4 Mad H. C. R. 422¹ the facts were quite similar. The defendants there agreed that a decree should be passed against them if they failed to perform an agreement by which they bound themselves to take an oath, the terms of which were set forth in the agreement. One of the defendants failed to take the oath whereupon the lower Courts passed a decree in the plaintiff's favour. This decree was reversed by the High Court and the trial Court was directed to decide the case on the merits.

In 31 Mad. 1⁶ the plaintiff had agreed that in case of his failure to take the proposed oath, his suit should be dismissed. He failed to take the oath. It was held that the suit could not be dismissed merely by reason of such failure although the refusal to take the oath could be recorded under S. 12, Oaths Act, and due weight could be given to it in appreciating the evidence produced by the

5. ('19) 6 A. I. R. 1919 Mad. 615 : 52 I. C. 619, *Athermankutti v. Chandroth Moideenkutti*.

6. ('08) 31 Mad. 1, *Etakkot Manmod Kutti's son Moyan v. Etakkot Kuthayi's daughter Pathukutti*.

4. ('14) 1 A. I. R. 1914 Mad. 449 : 37 Mad 408 : 15 I.C. 378, *Raja of Venkatagiri v. Chinta Reddy*.

parties and in deciding the case on the merits. The facts of the present case are quite identical with the facts of these two cases and the principle laid down therein is, therefore, clearly applicable to the present appeal.

Mr. Shamair Chand, the learned counsel for the appellant, drew my attention to a judgment of a Division Bench of the Allahabad High Court in 47 ALL. 456,⁷ in which the main question, which the Court had to decide, was whether one Ram Sundar was the legitimate son of one Bhikha. On Ram Sundar's behalf one Dukharan Dube came forward to give evidence. The opposite party Bhawani Prasad made an offer to the plaintiff that if Dukharan Dube, who was a member of the *biradri*, would eat *kachcha* food cooked by the mother of Ram Sundar and served by Ram Sundar himself, the plaintiff's suit might be decreed. The offer was accepted by the plaintiff, and the hearing of the suit temporarily suspended. The witness ate the *kachcha* food cooked by the mother of Ram Sundar and served by the latter. Thereupon the plaintiff's suit was decreed and this decree was upheld by the High Court. I am inclined to regard the offer made by the defendant in that case as an agreement to accept the evidence to be furnished by Dukharan Dube's conduct in taking *kachcha* food cooked by a lady, who was alleged by the defendant to belong to an inferior caste and not eligible for a valid marriage with Ram Sundar's father, and served by Ram Sundar himself as conclusive evidence of the correctness of the plaintiff's allegation as to his being the legitimate son of Bhikha. As soon as this evidence became forthcoming, the Court, in view of the agreement of the defendant, felt bound to accept it and act upon it. The suit was, therefore, decided not on the ground of a person having done or refused to do a certain thing but on the evidence. Be that as it may, it is noteworthy that even in this judgment it was distinctly held that the agreement on the part of the defendant to be bound by the proposed conduct of Dukharan Dube did not amount to an adjustment of the suit within the meaning of O. 23, R. 3, Civil P. C. It was observed by the learned Judges that it is surely open to a litigant at any stage of the proceedings to make an offer to the other side to bring litigation to a close and that in their Lordships' opinion in cases not governed by O. 23, R. 3, Civil P. C., agree-

ments to bring litigation to a close may be regarded in each case as an offer capable of acceptance or rejection by the person to whom it is made. The promises made by the offerer must be carried out by him if the offer is accepted in its terms and complied with accurately and fully. I do not discover in these observations, on which great stress was laid by Mr. Shamair Chand, anything repugnant to or inconsistent with the law as laid down in the Madras cases quoted above.

For the reasons given above I am of the opinion that the learned Senior Subordinate Judge has rightly held that the refusal of defendant 1 to take the oath could not justify the Court in decreeing the plaintiffs' suit merely on the strength of that refusal. I accordingly dismiss this appeal. In view, however, of the fact that defendant 1 himself offered to take the oath and also to submit to a decree of the plaintiffs' claim in case he failed to take the oath, I leave the parties to bear their own costs throughout.

V.B.

Appeal dismissed.

[Case No. 22.]

A. I. R. (33) 1946 Lahore 81

ABDUR RAHMAN J.

*Mohammad Ashraf (minor) through
his mother Mt. Fatima Bibi —*

Plaintiff — Petitioner

v.

Muhammad Bibi and others—

Defendants—Respondents.

Civil Revn. Petn. No. 6 of 1945, Decided on 22nd June 1945, from order of Sub-Judge, 1st Class, Sargodha, D/- 29th November 1944.

(a) Civil P. C. (1908), O. 33, R. 1 — Court to see whether minor is pauper—His next friend is rich is immaterial.

If the suit has been instituted on behalf of the minor the Court is only concerned with the decision of the question whether the minor is a pauper or not. It is immaterial whether his next friend is fairly rich. [P 82 C 1]

(b) Civil P. C. (1908), O. 33, Rr. 1 and 4 — Minor whether can sue in *forma pauperis*.

Having regard to the definition of the term 'pauper' given in O. 33, R. 1, it would not be correct to say that a suit by a minor in *forma pauperis* is not maintainable in spite of R. 4 which requires the applicant to present the suit in person unless he is exempt from personal appearance in Court. [P 82 C 1, 2]

K. L. Gosain — for Petitioner.

S. L. Puri — for Respondents.

Order. — This is a petition for revision against an order disallowing an application to sue in *forma pauperis* mainly on the ground that although the minor may not have been possessed of sufficient funds to bring a suit in

7. (25) 12 A.I.R. 1925 All. 271 : 47 All. 456 : 87 I.C. 174, Ram Sundar Misra v. Jai Karan Singh.

that form, yet the minor's real father was fairly rich and could have advanced the necessary funds to the minor plaintiff for paying the court-fee on the suit filed by him. It appears that the minor was taken in adoption by his uncle with the leave of the Deputy Commissioner as some of the property involved consisted of certain squares and in that case the sanction of the Deputy Commissioner was, it was urged, required under the Punjab Colonization Act. That may or may not be correct but the question remains as to whether the minor who was himself destitute could not sue in *forma pauperis* through a next friend who may even be fairly rich. The trial Court appears to have been impressed by the fact that the minor's real father was a man of means and that the institution of the present suit through the real mother was a mere device with the object of enabling the minor to bring a suit in *forma pauperis*. It may have been so but the point is whether it would have made any difference if a suit had been brought by the minor's natural father himself who might be assumed for the purposes of the case to have been rich enough to be able to pay the amount of the court-fee on the suit and to have got this suit instituted through his wife, the minor's natural mother. In my opinion neither of the facts are relevant. The term '*pauper*' has been defined in O. 33, R. 1 and if the suit has been instituted on behalf of the minor the Court is only concerned with the decision of the question whether the minor is a pauper or not. Learned counsel for the respondent contended that the Court should not interfere in this case as no question of jurisdiction was involved. He relied in support of this contention on a decision of Sind in A. I. R. 1933 Sind 82.¹ But if the Court has entirely misdirected itself and has taken wholly irrelevant matter into consideration for the purpose of coming to a decision and no evidence is on the record for the Court to have arrived at a decision in favour of the respondent, the Court must be found to have acted with material irregularity in giving a decision.

At one time during the hearing of this revision it struck me having regard to the provisions contained in O. 33, R. 4 that a minor pauper might not be competent to bring a suit in *forma pauperis* as the applicant was, according to the Code, required to present the suit in person unless he or

1. ('33) 20 A. I. R. 1933 Sind 82; 26 S. L. R. 491; 142 I. C. 379, Chandu Mal v. Tejul Bai.

she was exempt from personal appearance in Court. But on further consideration I am of the view that having regard to the definition of the term "*pauper*" given in R. 1 of O. 33 it would not be correct to hold that a suit by a minor in *forma pauperis* is not maintainable. If I were to construe R. 1 as not being applicable to minors — which obviously I cannot — it may handicap the minors who are already suffering from an infirmity. If the Legislature did not intend the minors to take advantage of the provisions of O. 33 it could have said so. For the above reasons I would allow this revision and send the case back to the trial Court for a decision on the merits. The application should be numbered and registered as a suit if the minor is found to be a pauper in point of fact. The parties are directed to appear before the lower Court on Monday the 16th July 1945. No order as to costs.

R.K./V.S.

Revision allowed.

[Case No. 23.]

A. I. R. (33) 1946 Lahore 82

TEJA SINGH J.

Firm Joint Hindu Family Diwan
Chand Sant Ram — Plaintiff —
Appellant

v.

Bhagat Ram and others —
Defendants — Respondents.

Second Appeal No. 983 of 1944, Decided on 17th July 1945, from decree of Senior Sub-Judge, Campbellpur, D/- 13th March 1944.

Accounts—Suit for — Suit is not maintainable unless it is only relief by which claimant can assert his legal rights.

The right to claim a statement of accounts is an unusual form of relief granted only in certain specific cases and is only to be claimed when the relationship between the parties is such that it is the only relief which will enable the claimant to satisfactorily assert his legal rights. In a suit for accounts the plaintiff must satisfy the Court that either because of a particular trade, usage or of the peculiar relations between the parties the defendant is an accounting party, or it is not possible for him to get any relief except by calling upon the defendant to render account to him and if he does so, the suit for accounts would lie. Thus, where according to an agreement arrived at between the plaintiffs and the defendants the plaintiffs were entitled to a proportionate share of profits in the bricks sold by the defendants over and above the quota allowed to them about which the defendants were to keep accounts, and it was not possible for the plaintiffs to state the exact amount of profits to which they were entitled without calling upon the defendants to render accounts to them, a suit for accounts by the plaintiffs was held maintainable : 60 P. R. 1899 ; ('33) 20 A.I.R. 1933 Lah. 483 and ('40) 27 A.I.R. 1940

Lah. 120, *Rel. on*; ('25) 12 A. I. R. 1925 Sind 173 and 122 P. R. 1881, *Ref.* [P 84 C 1, 2; P 85 C 1]

Shamair Chand — for Appellant.

S. Labh Singh and Hans Raj Suchdev —
for Respondents.

Judgment. — The facts giving rise to the case out of which this appeal has arisen may be shortly stated. Three brick kilns were working in the town of Hazro in May 1941; one belonged to the joint Hindu family of Diwan Chand-Sant Ram, the second to Bhagat Ram and Prahlad Chand and the third to Sewa Ram and Gian Chand. Bhagat Ram and Prahlad Chand are real brothers. No relationship is alleged between Sewa Ram and Gian Chand and it appears that they were working as partners. On account of keen competition between the kilns, it appears that none of them was making any profit. Consequently, Diwan Chand on behalf of his joint Hindu family, Prahlad Chand on behalf of himself and his brother and Sewa Ram and Gian Chand came together on 7th May 1941 and arrived at an agreement, the principal terms of which were—(1) that all the three kilns would charge specific rates for different kinds of bricks; (2) that out of every lot of 64 bricks to be sold, Diwan Chand and his family would sell 13, Bhagat Ram and Prahlad Chand 24 and Sewa Ram and Gian Chand 27; (3) that after each party had made the sale of his share, he would not make any further sales until the other parties had sold their quota, but if a party made the sale over and above his quota he would share the profits made thereby with others according to the proportion of the sales agreed upon; and (4) that a clerk would be engaged by Bhagat Ram to keep the account of the sales made by the owners of each kiln.

On 5th May 1942, Diwan Chand brought a suit for accounts on behalf of his joint Hindu family against Bhagat Ram, Prahlad Chand, Sewa Ram and Gian Chand, defendants 1 to 4, respectively, alleging that defendants 3 and 4 had sold about four lacs of bricks over and above their quota and according to the terms of the contract between the parties he and the other defendants were entitled to share in the profits made by them. He also alleged that defendant 1 failed to employ a clerk to keep the accounts as provided by the agreement and on this he had engaged the services of one Nanak Singh, who copied out some entries from the respective books of the kilns but subsequently the defendants refused to give him any information. The suit was resisted by the defendants on almost

all points. A number of issues were raised by the learned Subordinate Judge. Almost all the issues were found against the plaintiffs and the suit was dismissed with costs. The plaintiffs appealed to the Senior Subordinate Judge who in a carefully written judgment upset the findings of the trial Subordinate Judge on questions of fact and on some questions of law maintained his decree on the ground that the plaintiffs had no right to maintain a suit for rendition of accounts. This is a second appeal from the appellate decree of the Senior Subordinate Judge.

The only question involved in the appeal is whether the plaintiffs were entitled to bring the suit in the form they did, or they could only sue for a specific amount. Before entering into discussion on this point, I wish to refer to the findings of the learned Senior Subordinate Judge on other points which have not been challenged before me. They are — (i) that the contract set up by the plaintiffs between them and the other defendants as alleged by them has been proved; (ii) that the contract was neither in restraint of trade nor was it opposed to public policy and was valid; (iii) that the parties to the contract were not different firms which were respectively the owners of their kiln, but Diwan Chand representing the plaintiffs and the defendants individually; and (iv) that the contract did not create a partnership between the parties. It cannot be denied that the right to claim a statement of accounts is an unusual form of relief and as was pointed out by Aston A. J. C., in A. I. R. 1925 Sind 173,¹ there were two classes of cases in which an action for account lay at common law. This is what the learned Judge said:

“Such an action could be brought against persons who though not trustees stood in a sort of fiduciary relationship, e. g., bailiffs and receivers. Again, a person naming himself a merchant might bring the action against another naming him as a merchant. The right was extended by statute law so as to enable a joint tenant or tenant-in-common to obtain an account against another who had received more than his share of the rents and profits. In addition to this common law and statutory right the Court of Chancery had jurisdiction to order an account-in-aid of an equitable right as where a *cestui que* trust wanted an account from his trustee, or a mortgagor from his mortgagee, or a remainder man from a tenant for life. The Court of Chancery also ordered an account-in-aid of a legal right, e. g., when a principal wished to have an account from his agent, or the owner of a patent from the infringer. Equity also ordered an account when there were mutual

1. ('25) 12 A.I.R. 1925 Sind 173 : 78 I. C. 846, *Jessaram Bhagwan Das v. Ratanchand Fatehchand*.

accounts between the plaintiffs and the defendant or where there were circumstances of special complication."

In this Province the view was that a suit for accounts would not lie unless the defendant was in law accountable to the plaintiff: see 122 P. R. 1881.² In 60 P. R. 1899³ an agent had brought a suit for an adjustment of his accounts against his principal. The defendants objected that since the relation of the parties was not such as to impose upon them an obligation to keep accounts, the plaintiff could not demand accounts. It was held that in the absence of special circumstances, trade usage or definite contract, it would not appear that defendants were under any obligation to keep accounts for the plaintiff and render account to him. It was also held that

"the right to claim a statement of accounts is an unusual form of relief only granted in certain specific cases, and is only to be claimed when the relationship between the parties is such that this is the only relief which will enable the claimant to satisfactorily assert his legal rights. The mere fact that the defendants keep accounts does not give the plaintiff of necessity any right to claim 'an account' from them."

A. I. R. 1933 Lah. 483⁴ is a decision of this Court. The learned Judge while conceding that ordinarily a principal is not an accounting party and the agent has no right to call upon him for adjustment of account observed that it was not a hard and fast rule that under no circumstances can an agent call on his principal to render account. On the other hand, he does become an accounting party in special circumstances or under trade usage or a definite contract. In that case the plaintiffs were insurance agents and were to be remunerated by commission calculated on the premia on all policies effected or introduced through them. While holding that they could maintain an action for account, the learned Judge made the following remarks:

"While no doubt the plaintiffs are aware of all policies effected or introduced through them, they cannot certainly know which of these policies have lapsed, matured or been forfeited. Consequently it would not be possible for them to calculate what commission would be payable to them on policies effected through or introduced by them as agents of the Insurance Company. It was contended on behalf of the defendants-respondents that the plaintiffs could have requested the Insurance Company to furnish them with a statement of the policies in force and claimed the amount of commission due

to them as a specific sum, but in view of the litigation that had already ensued between the parties I do not think that the plaintiffs would have been supplied with the information in question."

The other case in point is A. I. R. 1940 Lah. 120⁵ decided by Bhide J. The suit related to the recovery of rent in respect of a site, which originally belonged to certain other persons but had been bought from them by the plaintiffs' ancestors. An ancestor of the defendants had taken the site on lease from the original owners. According to the terms of the lease the lessees were liable to pay rent at the rate of Rs. 10 per month but if the lessees were to sub-let and recover more than Rs. 60 per month, they were also liable to pay 1/4th of the excess to the lessors. The plaintiffs alleged that the defendants had failed to pay rent according to the terms of this lease and sued to recover a specific sum as rent for a given period and also claimed rendition of accounts alleging that the defendants had been realising more rent than Rs. 60. The learned Judge held that the plaintiffs had a right to claim rendition of accounts on the ground that the excess rent and the amount thereof were facts peculiarly within the knowledge of the defendants and it was very difficult for the plaintiffs to ascertain the exact amount which they could claim without the assistance of the defendants. It was argued on behalf of the defendants that the plaintiffs could enquire from the tenants but the contention was spurned with the observation that the tenants were under no obligation to disclose the accounts to the plaintiffs.

On the authority of these cases I have no hesitation in holding that the proposition that a suit for accounts can only be brought by a principal against his agent, or by one partner against another partner or by a *cestui que* trust against his trustee is too narrow to be acceptable. The correct position is that the plaintiff must satisfy the Court that either because of a particular trade, usage, or of the peculiar relations between the parties the defendant is an accounting party or it is not possible for him to get any relief except by calling upon the defendant to render account to him, and if he does that the suit for accounts would lie. There is no question of trade usage in the present case, but in view of the contract between the parties, which the lower appellate Court has held proved, I have no doubt that the plaintiffs' action for rendition of accounts was properly brought. The allegation is that

5. ('40) 27 A. I. R. 1940 Lah. 120 : 189 I. C. 770, Panna Lal v. Ram Richhpal.

2. ('81) 122 P. R. 1881, Gurditta v. Azam.

3. ('99) 60 P. R. 1899, Jowahar Singh v. Harya Mal.

4. ('33) 20 A.I.R. 1933 Lah. 483 : 144 I. C. 505, Ram Lal Kapur v. Asian Commercial Assurance Co. Ltd.

the defendants have sold a large number of bricks over and above the quota allowed to them. No doubt the plaintiffs put their number roughly at about four lacs, but the exact number could only be found from the account books of defendants 3 and 4. In addition, it has to be remembered that the plaintiffs could only claim a share of profits and it could not be possible for them to say what the profits were without calling upon the defendants to render account to them, both as regards the cost of manufacturing bricks and the prices actually realised. The learned Senior Subordinate Judge has observed that the plaintiffs could ascertain these facts by giving a notice to the defendants and by asking them to show their books of account to them. In my opinion, the learned Judge was too optimistic, and my own opinion is that the defendants would never have complied with the terms of the plaintiffs' notice if one had been given to them. In the result, I accept the appeal, set aside the decree of the Courts below and send back the case to the trial Court with the direction that a preliminary decree for accounts be passed in favour of the plaintiff against the defendants declaring the shares of profits to which the parties were entitled in accordance with the agreement and then to proceed in accordance with the provisions of law. The appellant will get his costs of all the Courts from the contesting defendants.

V.B.

Appeal allowed.

[Case No. 24.]

A. I. R. (33) 1946 Lahore 85**HARRIES C. J. AND MAHAJAN J.***Sat Narain Gurwala — Appellant*

v.

*Hanuman Parshad and another —**Respondents.*

Letters Patent Appeal No. 84 of 1943, Decided on 7th December 1944, from judgment and decree of Dhawan J., D/- 15th April 1943 in R. S. A. No. 252 of 1942.

(a) Civil P. C. (1908), S. 9—Statute creating right and providing for constitution of special tribunal for determining questions as to that right—Jurisdiction of civil Court if ousted.

Where a statute creates a right and provides for constitution of a special tribunal for determining questions as to that right and the special tribunal functions in accordance with the spirit and intent of the statute the civil Courts will have no jurisdiction to determine questions as to that right. But mere contemplation of a special tribunal is not enough to oust the jurisdiction of the civil Courts. It must come into being and having come into being it must function effectively and till that stage is reached the right being civil right is en-

forceable in the ordinary civil Courts under S. 9. If the special tribunal does not come into existence or having come into existence erroneously refuses to deal with matters with which it is entrusted there is no ouster of the jurisdiction of the civil Court : ('23) 10 A. I. R. 1923 Mad. 475 and ('34) 21 A. I. R. 1934 Pat. 670 (F. B.), *Rel. on ; Case law discussed.* [P 90 C 2 ; P 91 C 1]

Even if the jurisdiction of the civil Courts is excluded by reason of the special tribunal functioning effectively, the civil Courts will have jurisdiction to examine into cases where the provisions of the statute constituting the special tribunal have not been complied with or the tribunal has not acted in conformity with the fundamental principles of judicial procedure : ('40) 27 A. I. R. 1940 P. C. 105, *Rel. on.* [P 89 C 1]

The right of the litigant or of a party has to be decided at the time of the accrual of the cause of action. If at the time when the right accrued to him and the cause of action arose, a special tribunal did not exist or, if it existed, it refused to function and the civil Court became seised of the jurisdiction to decide that case, any subsequent appointment by the Local Government or any subsequent act of the special tribunal cannot oust the jurisdiction that has once been acquired and is being exercised by the civil Court : ('33) 20 A. I. R. 1933 All. 358, *Dissent.* [P 91 C 1, 2]

C. P. C. —

('44) Chitale, S. 9, N. 53, Pts. 1, 5, 6 ; N. 50.

('41) Mulla, Page 31, Pts. (z) and (a).

(b) Punjab Municipal Act (3 [III] of 1911), S. 240, Rules under, notified by Government of Delhi, Part VIII, R. 3 and Part XIII — Returning Officer rejecting nomination paper — Election petition lies to special tribunal under Part XIII—Special tribunal erroneously refusing to entertain petition — Suit challenging rejection of nomination paper lies in civil Court—Civil P. C., S. 9.

Erroneous rejection of a nomination paper by the Returning Officer is a material irregularity in the course of an election and, therefore, an election petition lies to the special tribunal (Deputy Commissioner) under Part XIII against the rejection of the nomination paper. [P 92 C 1]

If the special tribunal refuses to entertain and decide on the merits the election petition against the rejection of the nomination paper on the erroneous ground that the applicant had no *locus standi* to present it and the tribunal was not competent to hear it as no election petition lay, the action of the tribunal amounts to a refusal to exercise jurisdiction and not merely an error in the exercise of that jurisdiction and the civil Court would be competent to entertain a suit challenging the rejection of the nomination paper. [P 92 C 2]

C. P. C. —

('44) Chitale, S. 9, N. 53 Pt. 6 ; N. 50.

('41) Mulla, Page 31 Pts. (z) and (a).

(c) Punjab Municipal Act (3 [III] of 1911), Ss. 12 and 24 and S. 240, Rules under, notified by Government of Delhi, Part VIII, R. 3 and Part XIII — Term "election" — Meaning of—Words and phrases.

The term "election" in Ss. 12 and 24 embraces the whole procedure whereby an "elected member" is returned whether or not it be found necessary to take a poll. Hence, the rejection of a nomination paper even in a case where a candidate is elected without contest is a matter arising in the course of

an election within the meaning of Part XIII : ('28) 15 A.I.R. 1928 Mad. 253, *Rel. on* ; ('26) 13 A.I.R. 1926 Mad. 951, *Not approved* ; ('25) 12 A. I. R. 1925 Mad. 376, *Disting.* [P 93 C 2; P 94 C 1]

(d) Specific Relief Act (1877), S. 42 — "Legal character," meaning of—Municipal election — Suit for declaration that rejection of plaintiff's nomination paper was illegal and that defendant had not been elected as member is maintainable.

A right of vote or a right to stand as a candidate for being elected as a Municipal Commissioner is a very valuable right. The words "legal character" in S. 42 are wide enough to include the right of franchise and the right of being elected as a Municipal Commissioner, and therefore, a suit for declaration that a person's nomination paper has been illegally rejected and that the defendant had not been elected as a member of the Municipal Committee can be entertained by the civil Court under the provisions of S. 42, unless the jurisdiction of the civil Court can be held to be ousted by the Act which created the right. [P 94 C 1]

Bhagwat Dayal — for Appellant.

J. L. Kapur — for Respondent.

Mahajan J. — The contest in the suit which has given rise to this Letters Patent appeal lies between two rival candidates for a seat in the Municipal Committee of Delhi in the election held for the Committee in the year 1940. The plaintiff and the defendant were seeking election from the Maliwara, Election Ward No. 4. The plaintiff, Seth Sat Narain Gurwala, presented two nomination papers Nos. 40 and 80 duly subscribed by the electors and the candidate for the election which was to be held on 11th and 12th March 1940. Mr. E. S. Lewis had been appointed by the Deputy Commissioner as Scrutiny Officer to examine the nomination papers. The plaintiff's papers were rejected by that officer on 2nd March 1940. The plaintiff aggrieved with the order of the Scrutiny Officer presented an election petition to the Deputy Commissioner under the provisions of Part XIII of the Election Rules framed under the provisions of S. 240, Punjab Municipal Act, but the Deputy Commissioner refused to entertain the petition on the ground that it was not competent. The order of the Deputy Commissioner is dated 23rd April 1940. On 23rd August 1940 the plaintiff instituted the present suit for a declaration to the effect that he had been properly nominated as a candidate for the election as a member of the Delhi Municipal Committee in respect of Maliwara, Elective Ward No. 4 (Non-Muslim) and that defendant 1 was not a duly elected member of the Committee and was not entitled to function as such. An injunction was also claimed against the defendant restraining him from sitting as a member of the Committee.

The defendant raised a preliminary point and that was that the civil Court had no jurisdiction to hear and to deal with the plaintiff's suit. It was pleaded that the right which the plaintiff was seeking to enforce was the creation of a statute and the statute that created the right had also provided a remedy for giving effect to that right or for redressing grievances which may arise from non-enforcement of that right and therefore the jurisdiction of the civil Courts had been impliedly excluded. Three preliminary issues were framed in the case by the Subordinate Judge. Two of them were not of much use and require no consideration at all. It was issue 1 which was material to the decision of the case and that was in these terms : "Whether a civil Court had jurisdiction to try the suit?" The Subordinate Judge held that the officer appointed by the Deputy Commissioner for scrutinising the nomination papers was the final special tribunal in this matter and his decision excluded the jurisdiction of the civil Courts in dealing with the suit. The Election Rules, notified by the Local Government of Delhi under the provisions of S. 240, Punjab Municipal Act in Part VIII, provide for the appointment of a Scrutiny Officer and his powers. Rule 3 of this Part is in these terms :

"3. The Deputy Commissioner or any Gazetted Officer appointed by him shall examine every nomination form for the purpose of ascertaining that it is in order and that the candidate is duly qualified.

He shall also consider all objections duly made under R. 2 and shall dispose of them after due enquiry. In each case, he will decide as to the validity of the nomination, and will, should any case arise under Part V, R. 3 (b) (c) (d) (e) and (f), first take the order of the Local Government."

The trial Judge held that the decision of the officer appointed under this rule was a final decision and amounted to a decision of a Court of special jurisdiction created by the statute and therefore excluded the jurisdiction of the civil Court. The result was that the plaintiff's suit was dismissed by the trial Judge. The plaintiff went up in appeal to the learned District Judge. The learned District Judge did not uphold the view of the Subordinate Judge as to the construction placed on R. 3 of Part VIII; on the other hand, he held that the decision of the Subordinate Judge on this point was wholly wrong. The learned District Judge held that though the procedure for the scrutiny of nomination papers was provided for in Part VIII of the Election Rules, the other relevant part of the Election Rules was in Part XIII which was headed "The final decision of doubts and disputes as to the validity of an election."

This laid down that every petition against the return of any candidate at a municipal election on the ground of corrupt practice or any other ground, shall be made in writing signed by a person who was a candidate at the election or by not less than five electors and the petition shall be presented to the Deputy Commissioner etc. etc., that in view of this rule it would seem that under Part XIII the words "or any other ground" were wide enough to bring within its ambit an illegality in the order of a scrutiny officer. The learned District Judge therefore held that in view of these rules the decision of the officer entrusted with the scrutiny of nomination papers was not the final decision as to the validity of an election or on the question of the rejection of nomination papers but the special tribunal for this purpose was either the Deputy Commissioner under the provisions of Part XIII or the Local Government in cases where the Deputy Commissioner considered after enquiry that there had been some illegalities or irregularities or corrupt practices in the election and he had submitted a report to that effect to the Local Government.

The learned District Judge having held that the order of the Subordinate Judge as to the construction that he had placed on R. 3 of Part VIII of the Election Rules was erroneous, proceeded to consider whether the refusal of the Deputy Commissioner to entertain the election petition amounted to a refusal of the exercise of his jurisdiction and further whether if it amounted to a refusal of the exercise of jurisdiction, the civil Court could go into the question. On this part of the case, the learned District Judge preferred to follow the view of the Allahabad High Court that was cited before him and declined to follow the view that the Madras High Court had taken on this subject. It will be convenient to mention briefly the views of the two High Courts on this subject in order to appreciate the decision that the District Judge recorded on this part of the case. A Bench of the Madras High Court in 47 Mad. 585¹ had made the following observations :

"Where a statute itself sets up a proper tribunal for trying cases of the infringement of the right to such a legal character and that tribunal has functioned judicially, the civil Court will have no jurisdiction. But where the proper tribunal has declined jurisdiction and the aggrieved party is thus bereft of his statutory and constitutional remedy it is the province of the civil Court as a Court of equity to

fill the vacuum created and to exercise jurisdiction which the proper tribunal has failed to exercise."

The view that was taken by the Madras High Court in this case has subsequently been followed in a few other decisions of the same Court. On the other hand, the view taken by the Allahabad Court may be summed up in the following words : "It is an essential condition of rights conferred by a statute that they should be determined in the manner prescribed by the Act, to which they owe their existence. In such a case there is no ouster of the jurisdiction of the ordinary Courts for they never had any; there is no change of the old order of things; a new order is brought into being." The learned District Judge held that in this view of the matter no suit would lie in the civil Court because the right in the plaintiff was the creation of the Municipal Act and it must be adjudicated upon and in accordance with the manner prescribed in the Act. For the reasons mentioned the learned District Judge, though on different grounds, agreed with the decision of the Subordinate Judge in dismissing the plaintiff's suit.

From the concurrent decisions of the two Courts below a second appeal was preferred to this Court. It was heard by a learned Single Judge. The learned Single Judge considered this matter at great length and though he reached the conclusion that there would be jurisdiction in the civil Court even in cases where the special tribunal had been created and by its creation the jurisdiction of the civil Courts had been excluded, where that special tribunal did not act in accordance with the law that created it, yet the learned Single Judge thought that the present case did not fall within that rule. He held that the order of the Deputy Commissioner declining to entertain the election petition presented by the plaintiff was made in the exercise of his jurisdiction and that order did not amount to a refusal of the exercise of jurisdiction by the Deputy Commissioner and that being so the plaintiff's suit could not be dealt with by the civil Court. The plaintiff therefore was nonsuited even by the learned Single Judge. He has now presented this Letters Patent appeal.

Before proceeding further, it would be convenient to mention the grounds on which the Deputy Commissioner declined to entertain the election petition presented by the plaintiff to him questioning the order of the officer authorised to scrutinise the nomination papers. It may be observed that at the time the Deputy Commissioner dealt with the petition

1. (23) 10 A.I.R. 1923 Mad. 475 : 47 Mad. 585 : 73 I. C. 619, Sarvothama Rao v. Chairman, Municipal Council, Saidapet.

presented by the present plaintiff he had also before him another petition presented by Dr. C. R. Jayana and that petition raised a similar question. The Deputy Commissioner wrote a detailed order in the case of Dr. Jayana and wrote a short order in the case of the present plaintiff. He, however, made a reference in the short order that he had dealt with the case fully in the connected application of Dr. Jayana. Unfortunately the plaintiff did not place on the record the detailed order that had been passed by the Deputy Commissioner in Dr. Jayana's case and the learned District Judge had observed in his decision that he had not been able to see the detailed reasons of the Deputy Commissioner for declining to entertain the petition presented by the plaintiff. Mr. Bhagwat Dayal had a certified copy of the order of the Deputy Commissioner in Dr. Jayana's case. In order to fully understand the matter we had a look at that copy. In both these matters the Deputy Commissioner proceeded at the very initial stage to state what he was called upon to decide and he observed that the only point that he had to decide was whether the petition was maintainable. Then after a considerable discussion he proceeded to observe that the officer authorised by him to make scrutiny of the nomination papers under the provisions of Part VIII of the rules was the final Judge in this matter and that his decision could not be challenged by an election petition. Towards the conclusion of his decision he made the following observations :

"The above analysis of Part XIII leads on the whole to the conclusion that the orders passed by the officer performing the scrutiny of nomination papers cannot, under the Delhi Municipal Electoral Rules, be assailed by means of an election petition. Decisions in the opposite sense under electoral rules in other provinces may suggest the wisdom of such a remedy. But it is not the business of this Court to improve the rules, only to interpret them and apply them."

In the result the election petition presented by the plaintiff was held as not maintainable and was dismissed. It was conceded by Mr. Bhagwat Dyal, the learned counsel for the appellant, that where a special tribunal is provided by law then the jurisdiction of the civil Court is excluded provided the special tribunal has acted according to law. Mr. Jiwan Lal Kapur, the learned counsel for the respondent urged that if a special tribunal is appointed by an Act of the Legislature for the purpose of determining questions as to rights which are the creation of the Act, then, except so far as otherwise expressly provided or necessarily implied, the tribunal

appointed to determine those questions is the exclusive tribunal and no other Court has jurisdiction to entertain any proceedings whatsoever in regard to that matter. The difference in the two points of view argued before us lies in this. According to one point of view whenever a statute creates a right and provides a special jurisdiction for the adjudication of that right or for giving effect to that right or for redressing any grievances which arise by reason of the fact that the right is not being given effect to then, whether that tribunal is actually nominated by the Government or not, the jurisdiction of the civil Court is totally barred. On the other hand, the view of the appellant's learned counsel is that this is stating the proposition too widely. According to him it is no doubt true that where a right is created by a statute, ordinarily the person who has been given that right must follow the special procedure created by the same statute for giving effect to that right, but the learned counsel contended that where the special procedure or the special machinery created by the statute is not available either because the authority who had to appoint the tribunal would not appoint it or because the tribunal appointed would not function and would refuse to act, in that eventuality the jurisdiction of the civil Court could not be ousted by the contemplated special jurisdiction. The question that we have to decide is which out of the two views is the sound one. Section 9, Civil P. C., is in these terms :

"The Courts shall (subject to the provisions herein contained) have jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is either expressly or impliedly barred."

It has not been argued that the jurisdiction of the civil Courts has been expressly barred by anything contained in the Punjab Municipal Act or by the rules framed under S. 240 of that Act so far as the Delhi Municipal Committee elections are concerned. It is, however, contended that the jurisdiction of the civil Courts is barred by the necessary implication that arises by the creation of a special jurisdiction under the rules framed under S. 240, Punjab Municipal Act. In my view if the special tribunals constituted by these rules come into existence and they function, in that event, there can be no manner of doubt that the civil Courts would have no jurisdiction. Their jurisdiction to try any matter of a civil nature would be barred. On the other hand, if the tribunal, though contemplated by the rules and by the Legislature, do not come into existence

or having come into existence they refuse to deal with the matter with which they are entrusted, in that event the jurisdiction of a civil Court which it has under S. 9, Civil P. C., is not ousted. In 43 Bom. 221² a Bench of the Bombay High Court made the following observations with which I am in respectful agreement,

"that where a special tribunal is appointed for adjudging confiscations or penalties or both against a person who is alleged to have committed an offence, it seems to us that where this tribunal operates, especially as the order of the appellate authority is stated to be final, a suit in the ordinary civil Courts will not lie to set aside the order of the Special Appellate Tribunal. At the same time Government authorities cannot, to use a colloquial expression, have it both ways. They cannot have absolute immunity from civil suits and at the same time disregard the provisions of the Sea Customs Act. If the special tribunal has operated as provided by the Act, well and good. But if there has in fact not been a decision by such a tribunal arrived at in the manner provided by the Act, then the tribunal has not operated and the bar to a suit does not exist."

The same view of this matter has been taken by their Lordships of the Privy Council in I. L. R. (1940) Mad. 599.³ The relevant observations are in these terms:

"It is settled law that the exclusion of the jurisdiction of civil Courts is not to be readily inferred, but that such exclusion must either be explicitly expressed or clearly implied. It is also well-settled that even if jurisdiction is so excluded, the civil Courts have jurisdiction to examine into cases where the provisions of the Act have not been complied with or the statutory tribunal has not acted in conformity with the fundamental principles of judicial procedure."

Once a conclusion is reached in the present case that the Deputy Commissioner while refusing to entertain the election petition presented by the plaintiff refused to exercise jurisdiction, then this case would certainly fall within the ambit of the observations of their Lordships of the Privy Council cited above and also within the ambit of the observations of their Lordships of the Bombay High Court that have been mentioned already. The matter has been considered at some length by a Full Bench of the Patna High Court in 14 Pat. 24.⁴ The learned Chief Justice who gave the leading judgment in that case made the following observations at p. 39 of the report. In my view, it is necessary to give a full quotation of these observations.

2. (19) 6 A. I. R. 1919 Bom. 30 : 43 Bom. 221 : 49 I. C. 427, Ganesh Mahadeo v. Secy. of State.

3. (40) 27 A. I. R. 1940 P. C. 105 : I. L. R. (1940) Mad. 599 : I. L. R. (1940) Kar. P. C. 194 : 67 I. A. 222 : 188 I. C. 231 (P. C.), Secy. of State v. Mask & Co.

4. (34) 21 A. I. R. 1934 Pat. 670 : 14 Pat. 24 : 152 I. C. 805 (F. B.), Lachmi Chand v. Ram Pratap.

"It is contended, however, on behalf of the appellant that even if the Local Government has not in fact carried out its duty of appointing an election tribunal, that was the intention of the Legislature that such election tribunal should be appointed and that the appellant is in the position of one who has been deprived of a statutory right but has not been furnished with the tribunal who can enforce that right, and that in such case he has no legal remedy. Reference was made to the judgment in (1859) 6 C. B. (N. S.) 336 : 141 E. R. 486,⁵ the judgment of Willes J.—"There are three classes of cases in which a liability may be established founded upon statute. One is, where there was liability existing at common law, and that liability is affirmed by a statute which gives a special and peculiar form of remedy different from the remedy which existed at common law; there, unless the statute contains words which expressly or by necessary implication exclude the common law remedy, the party suing has his election to pursue either that or the statutory remedy. The second class of cases is, where the statute gives the right to sue merely but provides no particular form of remedy: there, the party can only proceed by action at common law. But there is a third class, viz., where a liability not existing at common law is created by the statute which at the same time gives a special and particular remedy for enforcing it. The present case falls within this latter class, if any liability at all exists. The remedy provided by the statute must be followed, and it is not competent to the party to pursue the course applicable to cases of the second class. The form given by the statute must be adopted and adhered to." It is contended that this particular case falls within the third class of cases contemplated by Willes J., and that the right to sue in the ordinary civil Courts does not exist, and reference is made to the judgment of Sir Lawrence Jenkins in 31 Bom. 604⁶ at page 609: 'but where a special tribunal, out of the ordinary course, is appointed by an Act to determine questions as to rights which are the creation of that Act, then, except so far as otherwise expressly provided or necessarily implied, that tribunal's jurisdiction to determine those questions is exclusive.' I would, however, point out that the facts before us constitute a fourth class beyond the three enumerated by Willes J. This is a case in which the right and liability has been created by statute where the Legislature has left to another authority the appointment of tribunal to try such liability and the framing of the procedure under which the tribunal so to be appointed is to carry out its duties, but the tribunal so contemplated by the Legislature has never been brought into existence. I may say that the apparent acquiescence by the Government in the jurisdiction of the civil Court and the corresponding attitude of the Government in Bengal may have accounted for the limited form in which Rule 68 was drafted.

It cannot be supposed that the Legislature contemplated that the Government might deprive persons to whom it had given a right, from having recourse to a tribunal to enforce that right and, in my opinion, in such circumstances that subject has the right to proceed in the ordinary civil Courts, unless and until the Legislature carries out its duty of appointing a special tribunal. It is clear that

5. (1859) 6 C. B. (N. S.) 336 : 28 L. J. C. P. 242 : 7 W. R. 464 : 141 E. R. 486, Wolverhampton New Waterworks Co. v. Hawkesfor.

6. (07) 31 Bom. 604, Bhaishankar Nanbhai v. Municipal Corporation, Bombay.

when this shall have been done, the jurisdiction of the civil Court will be ousted."

It will be observed that in that case though that Legislature had contemplated the appointment of a special tribunal to deal with election disputes, the Local Government had not constituted that tribunal and in these circumstances it was held that the civil Courts had jurisdiction. In another case that arose in Madras, and that is the case I have already mentioned (47 Mad. 585¹), the following observations were made by the Bench :

"..... the correct principle is that when a duly constituted tribunal has refused to try the question of the right of a party to the legal character of one entitled to be nominated to stand as candidate for an election and there is no other remedy available, the ordinary civil Court has jurisdiction to entertain a suit for that relief and the right to grant a proper temporary injunction retaining matters in *status quo ante* until the suit is tried."

In my view it is the principle enunciated in the two cases cited above that is the true principle governing this matter. The same view has been expressed by a Bench of the Calcutta High Court in A.I.R. 1936 Cal. 424.⁷ The view expressed by the Full Bench of the Patna High Court was followed by the Bench of the Calcutta High Court. In my view therefore if it is held in this case that the Deputy Commissioner refused to entertain the election petition presented by the plaintiff on the erroneous ground that he had no jurisdiction to hear it or that it was not maintainable, then in that event the special tribunal created by the statute has refused to function and hence the position is the same as if that special tribunal had not come into existence or does not exist so far as the plaintiff is concerned. In such circumstances, it cannot be held that there has been any ouster of the jurisdiction of the civil Court. It is not possible to hold that though the statute has given a right and has also prescribed a remedy for giving effect to that right in case there is an infringement of that right yet if that remedy becomes merely illusory, in that event the right stands defeated. To hold that though the plaintiff has statutory right yet he has no remedy in the situation that has arisen would amount to a denial of the statutory right. I am unable to subscribe to such a proposition. The Legislature did contemplate that the right conferred by the statute was an enforceable right and they did contemplate a remedy for giving effect to that right. But once that remedy, as stated above, becomes illusory and in-

effective and the special tribunal refuses to function, in that eventuality it cannot be said that the right which is of a civil nature stands defeated and cannot be enforced under the provisions of S. 9, Civil P. C. In my opinion there is no ouster of the jurisdiction of the civil Courts till the special Courts created by the statute function in accordance with the intent and spirit of the statute. Mere contemplation of a tribunal is not enough. It must come into being and having come into being it must function effectively and till that stage is reached the right which is a civil right is enforceable in the ordinary civil Courts under the provisions of S. 9, and it cannot be held that something illusory can take away the jurisdiction of the civil Courts.

Mr. Jiwan Lal Kapur for the respondent laid emphasis on a Bench decision of the Allahabad High Court in 55 ALL. 406.⁸ In that case the following observations were made by the learned Judges constituting that Bench at p. 415 of the report :

"We find it difficult to believe that the Legislature, while providing that a tribunal appointed by the Local Government should be seised of the matter, intended that the civil Court should also have, so to say, dormant jurisdiction to decide the question and that that jurisdiction is to become active the moment the Local Government refuses to appoint a tribunal. If the Legislature wanted not to bar the jurisdiction of civil Courts and not to give exclusive jurisdiction to the tribunal appointed by it, nothing would have been easier than to give expression to such an intention by express words in the enactment. The inconvenience that would result by conceding jurisdiction to the civil Court can better be imagined than described. The Local Government may, for reasons that appear convincing to it, delay the appointment of the tribunal. An aggrieved member may in the meantime file a civil suit and then a tribunal is appointed by the Local Government. What is to happen in such a case? Is the civil suit to be stayed or to continue and what is to happen if the decisions of the tribunal and of the civil Courts are contradictory? If the civil Court was to have concurrent jurisdiction with the tribunal, one would have expected provisions in the Act concerning these questions, and these matters could not have been left to be at large at common law. The omission in the Act to provide for such contingencies leads to the inevitable conclusion that the Legislature did intend to bar the jurisdiction of the civil Courts in such matters."

With due deference to the views of the learned Judges constituting the Bench in this case I record my respectful dissent with that view. The fallacy underlying the argument is the assumption that the civil Court has no dormant jurisdiction to decide the question once the Legislature has contemplated a special tribunal in the statute which

7. ('36) 23 A. I. R. 1936 Cal. 424 : 165 I. C. 606, Gopesh Chandra v. Benode Lal.

8. ('33) 20 A.I.R. 1933 All. 358 : 55 All. 406 : 142 I. C. 403, Joti Prasad v. Amba Prasad.

creates the right. Suppose, the right was created for giving effect to that right, can it be said that in that circumstance the civil Court would have no jurisdiction? As observed by Willes J. in the leading case of which I have already given a full quotation, the civil Courts would have in such a case jurisdiction to deal with the right of the subject and to give redress if any infringement of that right is made. The obvious inference from that proposition laid down by Willes J. is that the non-existence of the special jurisdiction, even when a right is created for the first time by the statute, attracts the jurisdiction of the civil Courts. The jurisdiction of a civil Court, once the right created by a statute is a right of a civil nature, is attracted forthwith along with the creation of that right and unless the statute creating the right expressly or impliedly takes away that jurisdiction, the civil Court would have power to adjudicate in the matter. Can the situation be said to be different if the special jurisdiction created is purely an illusory one and does not exist for all intents and purposes? Could it then be said that the civil Court had no dormant jurisdiction which would revive when the special jurisdiction created does not exist for all intents and purposes? I say with the greatest respect to the learned Judges who enunciated that proposition that there is a fallacy underlying the view that they expressed in that case. It must be assumed that as soon as the right was created, the civil Court became the proper tribunal to deal with any questions that may arise concerning that right, and that if a special tribunal was created to adjudicate upon those rights and that tribunal did function then in that event the jurisdiction of the civil Court would stand ousted. On the other hand, if that special tribunal never came into being or having come into being refused or neglected to function, in that event the jurisdiction of the civil Court cannot be said to be ousted.

The other argument envisaged by the learned Judges of the Allahabad High Court is the practical difficulty arising in a case if the Local Government later on appointed a tribunal or tribunal that had refused or neglected to carry out its duty starting functioning; in that eventuality what was going to happen. With due deference to the learned Judges I may observe here again that the difficulty envisaged by the learned Judges does not exist. The right of the litigant or of a party has to be decided at the time of

the accrual of the cause of action. If at the time when the right accrued to him and the cause of action arose a special tribunal did not exist or, if it existed, it refused to function and the civil Court became seized of the jurisdiction to decide that case, any subsequent appointment by the Local Government or any subsequent act of the special tribunal cannot oust the jurisdiction that has once been acquired and is being exercised by the civil Court. In my humble opinion, therefore, the Bench of the Allahabad High Court was not right in the observations that it made and in holding that the civil Court had no jurisdiction in the case that was before them. However, as the matters stand today, in my view, the decision of the Allahabad High Court cannot be said to lay down correct law. Their Lordships of the Privy Council in *I. L. R. (1940) Mad. 599*³ have made certain observations which I have quoted above and those observations in my judgment lead to the conclusion that the view expressed by the Allahabad High Court is no longer good law. Mr. Jiwan Lal Kapur also placed reliance on an opinion tentatively expressed by the learned Chief Justice of the Patna High Court in *14 Pat. 24*.⁴ These observations appear at p. 41 of the report and are in these terms :

"In the course of this case some discussion arose as to whether even when a special tribunal had been appointed and its procedure framed, the petitioner might proceed to a civil suit in the event of the special tribunal refusing or neglecting to carry out its duties in a proper manner; in other words, refusing or neglecting to exercise its jurisdiction. It was suggested that in such circumstances a civil suit would lie in the ordinary way and that the plaintiff will have an independent right of action by virtue of S. 9, Civil P. C. and S. 42, Specific Relief Act. It is not necessary for the purposes of this case to decide the point. But I would nevertheless venture to express my personal opinion that the argument is mistaken. There would, in my opinion, be no parallel jurisdiction and I agree with the opinions expressed in the Allahabad and the Madras cases above referred to."

With due deference to the learned Chief Justice I may observe that there is no question of parallel jurisdiction when a situation like this arises. The jurisdiction only lies in one place and that is in the ordinary civil Courts, when the special tribunal does not exist or refuses to function. The difficulty envisaged by the learned Chief Justice therefore does not at all arise in a situation like the present. When the special jurisdiction Court does not exist for all practical purposes then there is only one Court that is functioning and not two parallel Courts. In my judgment therefore the two cases on

which reliance was placed by Mr. Jiwan Lal Kapur do not in any way affect the view that has been taken in the cases in Madras and the view that has been taken by their Lordships of the Privy Council in I.L.R. (1940) Mad. 599.³ For the reasons given above, I would hold that in cases where a right is created by a statute and the remedy to give effect to that right is also created by that statute but that remedy becomes illusory, in those circumstances the civil Court has jurisdiction to entertain suit and to give effect to the right that has been created by the statute.

The only other question that arises now for consideration is whether in the circumstances of the present case there existed any special tribunal to grant relief to the plaintiff in respect of his statutory right and whether if a special tribunal existed that tribunal declined to act. In my judgment the learned Deputy Commissioner, when he held that the plaintiff had no remedy to proceed by an election petition before him against the order of the officer who had been empowered to scrutinise his nomination papers, clearly refused to exercise his jurisdiction. It has been held by the learned District Judge as well as by the learned Single Judge that the decision of the Scrutiny Officer appointed under Part VIII, rule 3, rejecting the nomination paper is not the final adjudication of the right of the candidate to be nominated. The procedure for final adjudication about the validity of an election or about the validity of a nomination paper has been prescribed in Part XIII of the Election Rules. Under that part an election petition lies "on any ground." One of the grounds is material irregularity committed in the course of the election. Erroneous rejection of a nomination paper by the Returning Officer would certainly be material irregularity in the course of an election, and that being so an election petition is clearly competent. If the Deputy Commissioner who was the special tribunal created by the rules went into the merits of the election petition and rejected it, even summarily, then the jurisdiction of the civil Court would obviously have been barred under the statute. Under the rules he is entitled to reject a petition summarily. If he goes into the petition and finds that there are grounds for further enquiry into the petition, he is entitled to hold a further enquiry and in that event when he holds a further enquiry he is to submit the matter to the Local Government and the Local Government in that event is the special

tribunal to finally decide the matter. In the present case, however, the Deputy Commissioner refused to entertain the petition on the erroneous ground that the plaintiff had no *locus standi* to present it and he was not competent to hear it as no election petition lay. In my view, the order of the Deputy Commissioner declining to give a decision on the merits of the petition amounts to a refusal of the exercise of his jurisdiction. It has been held in a large number of cases that a Court or a tribunal is deemed to have failed to exercise a jurisdiction vested in it by law where it refuses to entertain or it rejects a plaint, application or memorandum of appeal on the erroneous view that it has no power to entertain or deal with it. Erroneous rejection of an application on the ground that the applicant had no *locus standi* to apply is a failure to exercise jurisdiction. This view has been taken in a large number of cases that arose under the Code of Civil Procedure. In A. I. R. 1925 Lah. 174⁹ it was held that when a Court declines to give a decision on the merits, this means it refuses to exercise jurisdiction vested in it by law. Another learned Single Judge of this Court recently held that an order refusing to consider an application under S. 33, Arbitration Act, amounted to an order refusing the exercise of jurisdiction by a Court. There is considerable body of judicial opinion under the provisions of O. 21, Rr. 89 and 90, Civil P. C., to the effect that where a Court holds that a petition under the provisions of these rules is not maintainable then that amounts to a refusal of the exercise of jurisdiction by the Court. In my opinion, therefore, in the present case the order of the Deputy Commissioner holding that the plaintiff had no *locus standi* to present an election petition to him and that he was not competent to entertain it amounted to an order of refusal of the exercise of jurisdiction by the Deputy Commissioner and therefore under the rule enunciated in the earlier portion of this judgment, it must be held that the civil Court had jurisdiction to deal with the plaintiff's suit.

Mr. Jiwan Lal Kapur urged that the order did not amount to an order of refusal of exercise of jurisdiction but was an order made in the exercise of jurisdiction and therefore there had been no refusal of jurisdiction and the civil Court, even in the view that I have expressed above, had no power to deal with the plaintiff's suit. I am afraid

9. (25) 12 A.I.R. 1925 Lah. 174 : 78 I. C. 445, Imam Din v. Dittu.

I cannot put the construction that Mr. Jiwan Lal Kapur asks me to place on the order of the Deputy Commissioner. Any order made would have been an order in the exercise of jurisdiction once the Deputy Commissioner held that the petition was maintainable, but having held that he could not entertain it, it could not be said that he was exercising any jurisdiction. It is true that once a tribunal exercises jurisdiction it is entitled to exercise it rightly as well as wrongly, but when it throws out a case on the ground that it would not go into the merits of that case, in that event it cannot be held that it is acting in the exercise of jurisdiction erroneously. In my judgment the present case is one in which it must be held that there was a refusal of the exercise of jurisdiction and not merely an error in the exercise of that jurisdiction.

Holding as I have done that the civil Court had jurisdiction to deal with the plaintiff's suit, the decisions of the two Courts below must be set aside and the case must be remitted to the trial Judge for proceeding with it in accordance with law. Before concluding, however, I might examine briefly two contentions of Mr. Kapur that he raised. These contentions did not really arise on the question of jurisdiction but were connected with that point. His first contention was that Part VIII, R. 3 conferred upon the Scrutiny Officer jurisdiction and constituted him as a special tribunal for deciding the validity of the nomination papers. That is the interpretation that had been placed on Part VIII, R. 3 by the Subordinate Judge. In my view this attempt on the part of Mr. Kapur to rehabilitate the judgment of the learned Subordinate Judge must fail. The answer to the contention of the learned counsel is to be found in Part XIII and the rules contained in that part. In Rule 1 of Part XIII it is specifically laid down that the final Court or the special tribunal whose decision would be final on matters as to the validity of an election is the Deputy Commissioner and not the officer authorised by the Deputy Commissioner to make a scrutiny of the nomination papers. In my judgment, the learned District Judge and learned Single Judge came to a right decision on this point and for the reasons given in their judgments and for the reasons I have already given this contention of Mr. Kapur must be repelled.

Mr. Kapur finally raised a very interesting point and that was that the question of rejection of a nomination paper was not a

matter on which an election petition could be presented, as it was not a matter in the course of an election at all. He contended that the right to present an election petition only arises if a candidate has actually gone to the Polls and as a result of the polling has got himself elected, but in cases where the nomination paper is rejected or in cases where without a contest a candidate is elected, an election petition cannot be maintained. Mr. Kapur, for his contention, placed reliance on two Madras cases. The first one of these cases is a Single Bench decision of the Madras High Court in A. I. R. 1925 Mad. 376.¹⁰ That case, however, does not help Mr. Jiwan Lal Kapur's contention because there the rule which came for consideration before the learned Single Judge had been drafted in an entirely different language. The other case that the learned counsel mentioned is the case in 50 Mad. 86.¹¹ It is not necessary to discuss this case because in a later decision of the Madras High Court in A. I. R. 1928 Mad. 253¹² the matter was re-examined at some length and one of the learned Judges who was a party to the Bench case in 50 Mad. 86,¹¹ himself went back on the view that he had expressed in that case. In A. I. R. 1928 Mad. 253¹² the following observations were made with which I am in respectful agreement:

" whether a proceeding such as took place in the present case, where only a single candidate was nominated to the seat and no polling took place, it was an 'election'. The term is not defined in the Act or in the rules and doubtless in its ordinary or etymological meaning it implies some act of choosing on the part of the electorate, though indeed we are accustomed to speak of an 'uncontested election,' where the single candidate is unopposed. The significance of 'election' as a selection of one out of two or more was adopted by Phillips J., and my learned brother in 50 Mad. 86,¹¹ but with great respect I am led, by a consideration of the manner in which the word is used in the Act and rules, to attach to it a somewhat wider and more artificial meaning

I think therefore that the term 'election' may be taken to embrace the whole procedure whereby an 'elected member' is returned, whether or not it be found necessary to take a poll."

Madhavan Nair J., who was a party to the case in 50 Mad. 86¹¹ made the following observations :

"I think, speaking for myself, that Phillips J., and I interpreted the term 'election' in its etymological sense. The term as used in the Act

10. (25) 12 A.I.R. 1925 Mad. 376 : 85 I. C. 218, Srinivasachariar v. Venkatarama Aiyar.

11. (26) 13 A.I.R. 1926 Mad. 951 : 50 Mad. 86 : 97 I. C. 469, Krishnasamy Chettiar v. Ghulam Muhammad.

12. (28) 15 A.I.R. 1928 Mad. 253 : 108 I. C. 212, Srinivasalu Reddy v. Kupuswami Goundar.

seems to cover the whole procedure whereby an "elected member" is returned whether or not it be found necessary to take a poll After hearing fuller arguments on the question, I am inclined to agree with my learned brother's view regarding the meaning of the term 'election' as used in the Act."

The observations made in the Madras case related to the Act of the Legislature constituting Taluk Boards in that Presidency. In the Punjab Municipal Act similar provisions are found in ss. 12 and 24 of the Act. The word "election" in these sections has been used in a much wider sense than Mr. Jiwan Lal Kapur contended. In my view therefore the second contention of Mr. Kapur is also void of force. His client was elected to the Municipal Committee of Delhi only because the nomination paper of the plaintiff was rejected by the Scrutiny Officer. Otherwise there was bound to be polling at that election.

The only other matter that I wish to mention before concluding this judgment is that in my opinion the right conferred on a subject, i. e., a right of vote or a right to stand as a candidate for being elected as a Municipal Commissioner is a very valuable right and a suit for a declaration that a person's nomination paper has been illegally rejected and that the defendant had not been elected as a member of the Municipal Committee can be entertained by the civil Court even under the provisions of S. 42, Specific Relief Act. The words "legal character" are wide enough to include the right of franchise and the right of being elected as a Municipal Commissioner. The defendant was the person interested who denied the right of the plaintiff to such a legal character. A suit can, therefore, be properly brought under the provisions of S. 42, Specific Relief Act. It seems to me that where a candidate's nomination paper is rejected by the Scrutiny Officer, it automatically means that the voters' right of franchise has also been taken away, because the opportunity to exercise the right of franchise has disappeared. Both the candidate, and the voters have grievance in that matter and a valuable right of that kind cannot be held to be defeated unless in very clear language the Legislature has so defeated it. As has been said, it is a right of a very valuable kind and the civil Courts would have jurisdiction to deal with that right whenever that right is infringed, unless the jurisdiction can be held to be ousted by the Act that created the right. But, as I have already held, that cannot happen unless the special tribunal

acts in accordance with the law that created it and if it has not acted or has refused to act then the valuable right of the subject can be enforced in a civil Court under the provisions of S. 9, Civil P. C., and S. 42, Specific Relief Act.

For the reasons given above, I would allow this appeal, set aside the judgment of the learned Single Judge and of the two Courts below and would remand the case to the Subordinate Judge to proceed with it in accordance with law. Costs in all Courts will abide the event. The parties have been directed to appear before the Subordinate Judge on 2nd January 1945.

Harries C. J. — I agree.

G.N./D.H.

Appeal allowed.

[Case No. 25.]

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FULL BENCH

**BLACKER, BECKETT AND TEJA
SINGH JJ.**

Emperor

v.

Ralla Ram — Respondent.

Second Appeal No. 502 of 1943, Decided on 4th January 1944, from order of Blacker J., D/- 9th July 1943.

(a) Suits Valuation Act (1887), S. 9—Punjab R. 4 — Suit for declaration with consequential relief falling under R. 4 (b) — Value for jurisdiction should be as determined by the rule — Plaintiff can put his own valuation for court-fee.

The natural interpretation of R. 4 is that it provides for a jurisdictional value different from the court-fee value and not the contrary. Therefore though the jurisdictional value of a suit for a declaration with a consequential relief falling under R. 4 (b) be fixed under the rule at Rs. 101, the court-fee value is to be the amount at which the plaintiff honestly fixes the value to him of the relief claimed and need not be the same as the artificial jurisdictional value fixed by R. 4 (b).

[P 97 C 1]

(b) Suits Valuation Act (1887), S. 9— Rules under — Appeal — Amendment of rules after institution of suit — Appeal is governed by rules in force at date of suit. (Per *Blacker J.* in *Order of Reference*).

In the absence of any specific provision to the contrary the rules (under S. 9) governing the valuation of the appeal must be held to be the rules in force at the time of the institution of the suit.

[P 95 C 1]

Suits Valuation Act—

(44) Chitaley, S. 8, N. 33, Pt. 26.

(c) Suits Valuation Act (1887), S. 9— Rules under — Punjab R. 4 — Suit for injunction for removal of drain is governed by R. 4.

Where one of the reliefs prayed for in a plaint was an injunction for removal of a drain, held that the suit was governed by R. 4.

[P 96 C 1]

(d) Court-fees Act (1870), S. 7 (iv) — Valuation of relief by appellant—Court is bound to accept.

The Court is bound to accept the valuation put upon his relief by the appellant however arbitrary it may be. [P 96 C 1]

Court-fees Act—

(144) Chitaley, S. 7 (iv) (c), N. 21, Pt. 2.

(136) Aiyar (2nd) edition, P. 73.

(e) Suits Valuation Act (1887), Ss. 8 and 9—S. 9 is more than an exception to S. 8 — S. 8 has no application to cases coming under S. 9 or rules made thereunder — Under S. 9 only one value need not be fixed for all purposes : Civil Misc. No. 603 of 1931, **OVERRULED**.

Section 9 is more than an exception to S. 8. It is a separate provision dealing with quite different classes of cases. Section 8 applies to an ad valorem case where the value of the subject-matter is satisfactorily ascertainable. Section 9 applies to all cases, whether ad valorem or not in which the value of the subject-matter cannot be satisfactorily ascertained. Section 8 has no application to cases coming within S. 9 which like S. 8 is a quite independent provision or rules framed under S. 9. Section 9 itself cannot be interpreted as necessarily meaning that only one value must be fixed for all purposes : Civil Misc. No. 603 of 1931, **OVERRULED**. [P 96 C 2, P 97 C 1]

Suits Valuation Act—

(144) Chitaley, S. 8, N. 1, S. 9, N. 1.

Basant Krishan Khanna (Assistant to the Advocate-General) — for the Crown.

N. C. Pandit — for Respondent.

ORDER OF REFERENCE

Blacker J. — The facts of this case have been sufficiently set out in the reference of the learned Taxing Officer. Three questions arose before me, (1) whether this appeal is governed for the purposes of court-fee by the old rules or the new rules framed by the High Court under s. 9, Suits Valuation Act; (2) if under the old rules, whether the suit came under R. 4 of those rules; and (3) if so should not the appellant fix his value both for court-fees and for jurisdiction between Rs. 100 and Rs 500 and pay court-fee *ad valorem* on that valuation.

The first question, I think, presents no difficulty. In the absence of any specific provision to the contrary, it seems to me that under the general rules the rules governing the valuation of the appeal must be held to be the rules in force at the time of the institution of the suit, namely, the old rules. The learned Assistant to the Advocate-General in fact concedes this position.

With regard to the second point, the matter seems to me to be equally clear. The learned counsel for the plaintiff-appellant did indeed attempt to argue that R. 4 of the Rules did not apply but S. 7 (iv) (c), Court-

fees Act. A perusal of the plaint, however, will show that although there were other reliefs claimed one of the reliefs was an injunction for the removal of a drain. This appears to me to be amply sufficient to bring the suit and the appeal within R. 4.

That brings me to the third question. This is not an easy one to decide, not so much on account of any real ambiguity in the language of the statute and of the statutory rules, but owing to the divergent views which have been taken upon this question from time to time both in this Court and in other Courts. As the learned Taxing Officer has pointed out, this very question arose in 1940 in Regular Second Appeal No. 451 and Skemp J. who was then the Taxing Judge, referred it to a Full Bench. Unfortunately, there was no decision by the Full Bench as it appears that the appellant in that case paid the court-fee demanded. It seems to me, therefore, that this case ought also to be referred to a Full Bench to get a decision on the point that was left in the air in Regular Second Appeal No. 451 of 1940.

I do not propose to write a detailed order of reference because I have had the advantage of seeing Skemp J.'s order of reference in that case and it appears to me to say all there is to be said upon the matter. I would, therefore, request the Full Bench, if constituted, to take Skemp J.'s discussion in that case as the discussion of the law applicable in the present case. I accordingly recommend to the Hon'ble the Chief Justice the constitution of a Full Bench to decide this matter as soon as possible after vacation.

Judgment of the Full Bench.

Blacker J.—The facts of the case out of which this reference arises are that the plaintiff sued the respondent Committee for a declaration of his ownership of some land over which a public street had been constructed, and for three consequential reliefs: first, an injunction to remove the paving, secondly, an injunction to remove the drain and, thirdly, an injunction to cancel a resolution regarding the land. He valued his suit at ten rupees for jurisdiction and the same value for court-fee, paying twelve annas as court-fee. On second appeal to this Court he has repeated these valuations. The Stamp Reporter has objected contending that under R. 4 of the rules framed under S. 9, Suits Valuation Act, which were in force prior to 1st February 1943, (Rules and Orders, vol. 7, chap. 3-G), he had to fix

the value for jurisdiction at any sum exceeding Rs. 500, and that this value had also to be taken as the value for court-fee.

The case clearly comes under R. 4 by virtue of R. 7 (11), as one of the reliefs sought is the closing of a drain. One of the contentions raised on behalf of the appellant was that the Court is bound to accept the valuation put upon his "relief" by virtue of the last two clauses of S. 7 (iv), Court-fees Act, however arbitrary it may be. If the matter were *res integra*, I would have difficulty in interpreting the words "The plaintiff shall state the amount at which he values the relief sought," as meaning that he is at liberty to state an amount at which he does *not* value it, but chooses to say that he does in order to pay less court-fee. I would have been inclined to hold that they clearly meant that he was bound to state honestly what he really thought the relief was worth to him, i.e., how much he would be ready to pay for it if he had to buy it. Similarly, I would have found it difficult to hold that the words in the preceding clause "the amount at which the relief sought is valued in the plaint" could not mean the final amount as fixed after re-valuation under the orders of the Court as provided for in O. 7, R. 11, Civil P. C. However the matter is not *res integra*, as since 111 P. R. 1913,¹ the preponderance of authority in this Court is in favour of the view put forward on behalf of the appellant.

Moreover the question does not appear to me to be really important in this case. In the first place, there is no material for a finding that the plaint was in fact under-valued. There is not even a discrepancy between the amount fixed for court-fee, and the amount fixed for jurisdiction as in many of the cases that have come before the Courts. The real question is whether the plaintiff must fix the same value for court-fee as he has to fix for jurisdiction under R. 4 of the Rules framed under S. 9, Suits Valuation Act, i.e., Rules and Orders, Vol. I, Chap. 3G, R. 4, which runs as follows:

"Suits in which the plaintiff in the plaint seeks to establish or to negative any right hereinafter mentioned, with or without an injunction, and with or without damages, namely, a right of way; a right to open or maintain or close a door or a window, or a drain, or a water-spout (parhala); a right to or in a water-course or to the use of water; a right to build or raise or alter or demolish a wall or to use an alleged party wall or joint staircase —

Value.—(a) For purposes of Court-fees Act 1870, as amended by that Act.

(b) For the purposes of the Suits Valuation Act, 1887, and the Punjab Courts Act, 1918 (as amended) —

(i) if damages are not claimed such amount exceeding Rs. 100 and not exceeding Rs. 500, as the plaintiff may state in his plaint;

(ii) if damages are claimed, the amount of such damages increased by Rs. 100."

Under this rule the value for jurisdiction will have to be raised to Rs. 101, and the only question is whether the court-fee value must be held to be the same. The answer to this question depends upon the interpretation of Ss. 8 and 9, Suits Valuation Act.

In 63 P. R. 1902² a Division Bench of the Chief Court held that under S. 8, the two values had to be same, and therefore if one value was fixed by Statutory Rule the other value had to follow it. In a subsequent Full Bench case, *Najm-ud-Din v. Municipal Committee, Delhi*,³ however, it was held that S. 9 was an exception to the general rule laid down in S. 8, though the Bench did go on to say that the value fixed by sub-r. (b) of R. 4 was to be taken as the value assessed under sub-r. (a). 111 P. R. 1913¹ did not lay down that there could only be one value. Having held that the suit was properly valued for court-fee, the Bench merely stated that, as this value came within the limits fixed by R. 4 it could and should also be taken as the jurisdictional value. It seems to me, however, that S. 9 is more than an exception to S. 8. It is a separate provision dealing with quite different classes of cases. Section 8 applies to an *ad valorem* case where the value of the subject-matter is satisfactorily ascertainable. Section 9 applies to all cases, whether *ad valorem* or not, in which the value of the subject-matter cannot be satisfactorily ascertained. In my view, therefore, S. 8 has no application to cases coming within S. 9, which, like S. 8, is a quite independent provision.

The question, therefore, narrows itself down to whether S. 9 itself lays down that the value fixed by the rules must be the same for all the purposes envisaged by the section. This view was held by Addison J. as taxing Judge in Civil Misc. No. 603 of 1931⁴ and was followed by a Division Bench of which he was a member in A.I.R. 1936 Lah. 990.⁵ After citing the case in 63 P. R. 1902² the learned Judge held that the plain meaning of S. 9 could only be that the rules fixed the

2. ('02) 63 P. R. 1902, Nanak v. Guranditta.

3. ('04) 6 P. R. 1904 (F. B.).

4. Civil Misc. No. 603 of 1931, decided on 24th March 1931, Kathu v. Pohlu.

5. ('36) 23 A.I.R. 1936 Lah. 990 : 167 I. C. 588, Diwan Chand v. Sant Ram.

1. ('13) 111 P. R. 1913 : 22 I. C. 503, Barru v. Lachhman.

same value for all the three purposes to which the section referred. The relevant portion of S. 9 runs as follows :

" the High Court may direct that suits of that class shall, for the purposes of the Court-fees Act, 1870, and of this Act and any other enactment for the time being in force, be treated as if their subject-matter were of such value as the High Court thinks fit to specify in this behalf."

I am of opinion that on first impression the language of this section does seem to indicate one value for all these purposes. But on further reading of the section I must respectfully disagree with the view that this is the only possible meaning of the words. On the other hand, the rule itself, which is cited above, seems clearly to indicate that different valuations were contemplated. In the same rules R. 1 has in fact itself fixed different values for court-fees and for jurisdiction, i. e., Rs. 200 and Rs. 1000. The Chief Court, therefore, in framing these rules was clearly of opinion that different values could be fixed under S. 9. The committee of the High Court which framed the new rules published in 1943 seems to have been of the same view, vide R. 1 of the Correction Pamphlet No. 2 dated 1st February 1943, to Volume I of the Rules and Orders. The same proposition actually flows from 6 P. R. 1904³ where, though the Bench did hold that the value under R. 4 (b) was to be taken as the value on which court-fee was to be assessed under sub-r. (a), it did concede that separate values could be assessed under these rules. There is nothing to the contrary in 111 P. R. 1913¹ where it was only held that the value competently fixed for court-fee was a value which could have been fixed for jurisdiction under the rule, and should therefore be taken as such value. Their view was clearly that ordinarily jurisdiction value follows court-fee value and not *vice versa*.

It seems to me, therefore, that S. 8, Suits Valuation Act, has no application to cases coming under rules framed under S. 9, that S. 9 itself cannot be interpreted as necessarily meaning that only *one* value must be fixed for all purposes, that the rules framed under this section have, in fact, fixed different values, and the natural interpretation of R. 4 is that it provides for a jurisdictional value different from the court-fee value and not the contrary. Therefore, though the jurisdiction value of the present suit should be fixed under the rule at Rs. 101; the court-fee value is to be the amount at which the plaintiff honestly fixed the value to him of the relief claimed, and need not be the same as the artificial jurisdiction value fixed by R. 4 (b).

As in this case there is nothing to show that the valuation of the relief at Rs. 10 is not honest it must be accepted, if not under duress of the Statute at any rate under the exigencies of the case. My decision, therefore, is that in the circumstances of this case the appeal is sufficiently stamped.

Beckett J. — I agree.

Teja Singh J. — I agree.

G.B./D.H.

Order accordingly.

[Case No. 26.]

* **A. I. R. (33) 1946 Lahore 97**

FULL BENCH

MUNIR, MARTEN AND ACHHRU RAM JJ.

Ch. Kidar Nath and others —

Decree-holders—Appellants

v.

Mian Saraj-ud-Din — Judgment-debtor — Respondent.

First Appeal No. 240 of 1941, Decided on 18th December 1944, from order of reference by Beckett and Bhandari JJ., D/- 16th May 1944.

* (a) **Civil P. C. (1908), O. 34, R. 6—Mortgage-debt subsisting but personal remedy in respect of principal barred by limitation—Covenant to pay interest independent of covenant to pay principal—Mortgagee can get personal decree for interest for period of six years preceding suit for sale—Limitation Act (1908), Art. 116.**

If the stipulation for payment of interest in a mortgage-deed does not constitute an independent agreement, and is no more than a part of the contract for the payment of the principal, the mortgagee cannot get a personal decree for the recovery of the interest, even for the period of six years preceding the suit, in a case where his suit for the enforcement of the personal remedy in respect of the principal is barred by time at the time of the institution of the suit. There being one contract from which the liability for the principal and the interest arises, the cause of action arising from the breach of contract is not divisible or severable and the time for the recovery of both principal and interest must be deemed to begin to run from the date when the breach takes place. If the covenant for payment of interest is an independent and separate agreement, the breach of such covenant will give rise to a separate cause of action, independently altogether of the cause of action arising on a breach of the covenant for the payment of the principal. A suit instituted within six years of such breach will obviously be within time, in view of the language of Art. 116, Limitation Act, and cannot be held to be barred by limitation, merely because an action for compensation for breach of another independent covenant has become time-barred. The mortgagee is entitled to a personal decree for recovery of such interest even though he has no subsisting right to get a personal decree for the recovery of the principal. This is, however, subject to the proviso that the mortgagee is not entitled to any relief in respect of interest falling due after the mortgage-debt itself has become irrecoverable, because in that event his suit for sale itself will be liable to dismissal as

barred by time and no occasion will arise for him to apply for a personal decree under O. 34, R. 6, Civil P. C.: ('28) 15 A.I.R. 1928 Lah. 653, *Expl.*; *Case law discussed.* [P 102 C 2; P 103 C 1]

Limitation Act —

('42) Chitaley, Art. 116, Note 20, Pt. 8.

(b) Limitation Act (1908), Art. 116 — Suit to enforce personal covenant in registered mortgage—Art. 116 applies.

A suit for the enforcement of a personal covenant, express or implied, in a registered mortgage-deed is governed by Art. 116 : *Case law referred.* [P 99 C 2]

Limitation Act —

('42) Chitaley, Art. 116, Note 19, Pt. 3.

Shamair Chand — for Appellants.

Khurshid Zaman and Mohsin Shah —
for Respondent.

ORDER OF REFERENCE

Beckett J. — The only question in this case is whether a mortgagee, who has lost his right to recover the mortgage-debt as an ordinary debt by lapse of time, but retains the right to recover the debt out of the sale proceeds of the mortgaged property, and does bring the mortgaged property to sale, though without recovering the full amount due to him, can be allowed to recover interest for six years prior to the institution of the suit by means of a personal decree. In A.I.R. 1928 Lah. 653,¹ it was held by a Division Bench of this Court that he could, the reason given being that the principal debt was not, so to speak, completely dead, since it could still be recovered out of the mortgaged property, and this allowed interest to accrue as a fresh charge. This decision was followed by a Single Bench of this Court in 126 I. C. 433.² In A. I. R. 1936 Lah. 387,³ another Division Bench of this Court took a different view, and held that interest being a mere accessory to principal, could not accrue on a debt which had become time-barred. The last of these decisions purports to distinguish the first ruling on the facts of the two cases, but the reasons given for the judgment in A.I.R. 1928 Lah. 653¹ do not seem to be distinguishable nor have counsel in the present case been able to explain how the reasoning is to be distinguished. Mr. Shamair Chand for the appellant has suggested that a reference to a larger Bench might be avoided by granting him a decree in respect of costs only; but in his statement of 30th January 1941 (at p. 22 of the printed paper-book) the decree-holder clearly gave up all claims except in respect of interest.

1. ('28) 15 A.I.R. 1928 Lah. 653 : 111 I. C. 808, *Ralia Ram v. Hira Lal.*

2. ('30) 17 A.I.R. 1930 Lah. 737 : 126 I. C. 433, *Munshi Ram v. Puranchand.*

3. ('36) 23 A.I.R. 1936 Lah. 387 : 163 I. C. 119, *Dost Mahomed v. Miraj Din.*

Mr. Shamair Chand has also referred to A.I.R. 1929 P. C. 240,⁴ but the circumstances of that case were peculiar and it is doubtful how far the decision can be applied to the question now at issue. I would, therefore, refer the following question for decision by a Full Bench. When the personal remedy on a mortgage-debt is lost, but the remedy against the mortgaged property survives and a decree for recovery of the debt with interest is obtained, but sale proceeds are not sufficient to cover the whole of the claim, can the mortgagee be given a personal decree for the recovery of interest up to six years preceding the suit?

Bhandari J. — I agree.

Judgment of the Full Bench

Achhru Ram J. — On 13th November 1919, Saraj Din Khan defendant executed a mortgage-deed in favour of Kidar Nath, Kanshi Ram and Hari Ram plaintiffs whereby he mortgaged some residential property, situate in the town of Ludhiana, to the latter for a sum of Rs. 4000, agreeing to pay interest at the rate of one per cent. per mensem. It was agreed that the mortgage-money would be paid two years after the date of the mortgage. It was further stipulated that interest was to be paid to the mortgagees every month commencing from 11th December 1919; that in case of default in the payment of monthly interest, arrears of interest for three months were to be paid in a lump sum at the end of three months; that in case of default in such payment, the accumulated arrears of interest for any period of three months were to be regarded as a part of the principal and had to be paid, together with interest thereon, at the time of redemption; and that the mortgagees were to have the right, after the expiry of two years, to recover the amount due to them on account of principal, interest and compound interest, as well as on account of costs of repairs and interest thereon, by sale of the mortgaged property, and also from the other property and person of the mortgagor. The mortgage-deed further recited that possession of the mortgaged property had been made over by the mortgagor to the mortgagees and that, in taking the account, the former would be entitled to get credit for the rent actually realised by the mortgagees. On the date on which the mortgage-deed was registered, namely, 15th November 1919, Saraj Din Khan executed a

4. ('29) 16 A.I.R. 1929 P. C. 240 : 119 I. C. 623 (P. C.), *Cheang Thye Phin v. Lam Kin Sang.*

rent deed in favour of the mortgagees (Ex. P-2 at p. 28) according to which he was to hold the mortgaged property as a tenant under the mortgagees undertaking to pay Rs. 40 per mensem by way of rent. It will be observed that the rent agreed to be paid represented exactly the interest payable on the principal mortgage-money.

On 7th November 1931, the mortgagees brought a suit against the mortgagor for the recovery of a sum of Rs. 13,000 by sale of the mortgaged property. On 23rd January 1933, a preliminary decree was passed in favour of the plaintiffs declaring that a sum of Rs. 13,000 was due to them from the mortgagor on 15th November 1931, that the aforesaid amount was to carry interest at the rate of one per cent. per mensem till realization, that Rs. 1331 were payable to the plaintiffs as costs of the suit, and that in case of defendant's failure to pay the same within the time allowed by the preliminary decree, the mortgagees were to have a right to apply for a final decree. On 27th June 1933, the final decree was passed. In execution of this decree the mortgaged property was sold. It, however, appears that a considerable portion of the mortgaged property either did not belong to the mortgagor, at the time of the mortgage, or was subject to other encumbrances. A number of suits were instituted by persons claiming under transfers previously effected by the mortgagor with the result that a good deal of the mortgaged property was eventually lost to the plaintiffs. Only Rs. 427-8-0 were realised by them out of the sale proceeds of as much of the mortgaged properties as were found to be liable for the mortgage-debt.

On 16th April 1937, the plaintiffs made an application, under O. 34, R. 6, for a personal decree being passed against the mortgagor in respect of the outstanding balance of the mortgage decree, which was stated to be in the neighbourhood of Rs. 8,000. On 3rd February 1938, a statement was made on behalf of the plaintiffs confining the claim to a personal decree only to the amount of interest, on the principal sum of Rs. 4,000, that had accrued due during the six years preceding the commencement of the suit, the amount of such interest being Rs. 2880. The learned Subordinate Judge dismissed the application on 10th March 1941, holding suit for all personal relief to be barred by limitation. He was of the view that inasmuch as the suit for a personal relief in respect of the principal sum was admittedly barred by limitation on the date on which it was filed,

it must be deemed to be equally barred in respect of interest even for the six years preceding the suit. Against this decision of the learned Subordinate Judge, the plaintiffs filed a first appeal in this Court which was heard by Beckett and Bhandari JJ. on 16th May 1944. Their Lordships being of the view that there was a conflict of opinion between two Division Bench judgments of this Court on the subject, namely, A. I. R. 1928 Lah. 653¹ and A. I. R. 1936 Lah. 387,² have referred the following question to a Full Bench :

"When the personal remedy on a mortgage-debt is lost, but the remedy against the mortgaged property survives and a decree for recovery of the debt with interest is obtained, but sale proceeds are not sufficient to cover the whole of the claim, can the mortgagee be given a personal decree for the recovery of interest up to six years preceding the suit?"

It is beyond dispute that a suit for the enforcement of a personal covenant, express or implied, in a registered mortgage-deed is governed by Art. 116, Limitation Act. There was at one time some doubt as to the implications of certain observations made by their Lordships of the Judicial Committee in 5 Pat. 585,³ but by now it is well settled that those observations were not intended to alter the law as applicable to actions for the enforcement of personal covenants, whether express or implied, against a mortgagor in respect of the mortgage-debt. The Full Benches of the Madras and the Allahabad High Courts in 52 Mad. 105⁴ and 52 ALL. 363,⁵ a Division Bench of this Court in 16 Lah. 187,⁶ a Division Bench of the Patna High Court in 13 Pat. 228⁷ and a Division Bench of the Calcutta High Court in 35 C. W. N. 1030⁸ have dealt with this question at considerable length and have laid it down that in spite of the observations in 5 Pat. 585,³ Art. 116, Limitation Act, is the article applicable to actions for the enforcement of personal covenants in registered mortgage-deeds.

Article 116 gives the parties six years for a suit for compensation for the breach of a

5. (26) 13 A.I.R. 1926 P. C. 56 : 5 Pat. 585 : 53 I. A. 134 : 95 I. C. 839 (P.C.), Ganesh Lal v. Khetramohan.

6. (29) 16 A.I.R. 1929 Mad. 53 : 52 Mad. 105 : 116 I. C. 817 (F.B.), Ratnasabapathi Chettiar v. Devasigamony Pillai.

7. (30) 17 A.I.R. 1930 All. 69 : 52 All. 363 : 123 I. C. 321 (F.B.), Radha Krishna v. Tej Saroop.

8. (34) 21 A.I.R. 1934 Lah. 765 : 16 Lah. 137 : 153 I. C. 1064, Kesri Mal-Umrao Singh v. Tan-sukh-Rai Kidar Nath.

9. (34) 21 A.I.R. 1934 Pat. 578 : 13 Pat. 228 : 153 I. C. 120, Bala Bux v. Nath Mull.

10. (31) 18 A.I.R. 1931 Cal. 801 : 133 I. C. 101 : 35 C. W. N. 1030, Umapada Trivedi v. Haripada Saha.

contract in writing registered, the *terminus a quo* being the date when the contract is broken, or, where there are successive breaches, when the breach in respect of which the suit is instituted occurs. According to the language of the article, therefore, a suit for the enforcement of the personal covenant, express or implied, in a registered mortgage-deed can be brought within six years from the date of the breach of that covenant. The question that we have to consider in the present case is whether where the breach of the personal covenant for the payment of the principal mortgage-money occurred more than six years prior to the institution of the suit, there can be a separate and independent breach of the covenant to pay interest subsequent to the lapse of time for the enforcement of the personal covenant in respect of the principal, so as to entitle the mortgagee to maintain an action within six years from the date of such breach.

The obligation to pay interest is, undoubtedly, to this extent an addition or an accessory to the principal obligation to pay the principal debt that, with a discharge of such principal obligation, it is, for the future, *ipso facto* extinguished. For the period during which the principal is wholly irrecoverable, either by reason of the operation of the statutes of limitation or otherwise, the interest is also irrecoverable. It is also indisputable that where the obligation to pay interest is an integral part of the obligation to pay the principal and where there is no separate or independent agreement to pay the interest, the interest is merely an accessory to the principal debt and the claim to the interest falls to the ground and becomes unenforceable as soon as the principal becomes irrecoverable. The leading English case on the subject is (1836) 5 L. J. C. P. 264.¹¹ The following observations of Tindal C. J. have been quoted in most of the cases dealing with the subject:

"The first objection, without any reference to the mode of pleading, appears to be reducible to this, that the statute does not operate as a bar to the recovery of the interest, though it does to the recovery of the note, and that an action may be maintainable for the interest, though it would not for the principal. This supposition appears to proceed on the ground, that the cause of action may be severed and divided. But there is but one contract from which alone the principal and the interest arise. The contract upon which they are founded is one and the same; they constitute and may be considered as the principal and accessory of the debt; and by the rule of law, if the principal be barred, the accessory falls with it to the ground."

11. (1836) 5 L. J. C. P. 264, Hollis v. Palmer.

However, the contract for payment of interest may be, by itself, a substantive contract, creating a separate and independent obligation. Such a contract may be enforced even though no action has been brought for the enforcement of the contract in respect of the principal and even though such action is, in fact, incompetent. The judgment of Tindal C. J. in (1836) 5 L. J. C. P. 264¹¹ obviously proceeds on the assumption that, in the particular case, there was one contract in respect of the principal and the interest and that the cause of action for the recovery of the two was not severable or divisible. There is a fairly large body of authority in support of the proposition that where there is a separate and independent covenant for payment of interest, the same can be enforced by means of an action even though the covenant in respect of the principal is not at the time enforceable. In 2 I. C. 111,¹² Mookerjee J., in dealing with the question whether, where interest was agreed to be paid every year, and the first instalment of the interest under the terms of the mortgage deed fell due on 12th January 1894, whereas the principal amount was not payable till 12th April 1894, the suit which, when brought, was manifestly within time in respect of the principal, could be deemed to be barred by limitation in respect of the first instalment of interest, made the following observations at p. 112:

"The same view was taken by Tindal C. J. in (1836) 5 L. J. C. P. 264.¹¹ In answer to the contention that the remedy for the principal may be barred without affecting the remedy for interest which accrues *de die in diem* and is a continuing or constantly renewing cause of action, the learned Chief Justice ruled that interest has always been deemed a mere accessory of the loan and when the demand for principal is barred the accessory falls along with it. The learned Chief Justice further observed that in cases where there is an express contract to pay interest, independently of the principal, there may be room for the argument that you may sever the contract to pay interest from the contract to pay the principal. I refer to this last observation in support of the view that the first instalment of interest due on 12th January 1894 may very well be barred by limitation though the claim for the principal, which was not repayable till 12th April 1894, may not yet be barred by limitation."

The claim for the first instalment of interest could evidently not be barred unless a suit for its recovery was maintainable despite the principal not being yet due. In 35 Bom. 327¹³ a case where the mortgage-deed was found to contain a personal cove-

12. ('09) 2 I. C. 111 (Cal.), Nilmoney Sinha v. Hardhan Das.

13. ('11) 35 Bom. 327 : 12 I. C. 42, Madappa Hegde v. Ramkrishna Narayan Bhat.

nant to pay interest on the mortgage-money from year to year, their Lordships of the Judicial Committee were pleased to hold that a suit for arrears of interest alone was maintainable. In 48 Mad. 703,¹⁴ it was held by implication that where a mortgage-bond contained an independent personal covenant to pay interest every month, besides providing for payment of the principal with the interest on demand, a suit based on the covenant to recover interest personally from the mortgagor, without suing for the recovery of the principal, was competent. The precise question which called for decision was whether a suit brought for the recovery of interest personally from the mortgagor, on the basis of an independent personal covenant to pay interest every month, barred a subsequent suit for the principal and interest by sale of the mortgaged property, and their Lordships answered this question in the negative. In our own Court, a Full Bench gave the same answer to a similar question as to the applicability of O. 2, R. 2, in 16 Lah. 640.¹⁵ Both these judgments proceed on the assumption that where there is an independent covenant for the payment of interest, a suit for the enforcement of that covenant may be brought without suing for the principal.

In A. I. R. 1929 P. C. 240,⁴ an appeal from the Supreme Court of the Straits Settlements of Malaya, their Lordships of the Judicial Committee held that where there is no independent contract to pay interest, the interest is mere accessory to the principal and is irrecoverable if the principal is not recoverable; but that if there is a special contract to pay interest at a specified rate, then the principle as to the interest not being recoverable where the principal is irrecoverable does not apply. It is, no doubt, true that the facts with which their Lordships had to deal in that case were different from those of the present case, but the principle enunciated by their Lordships is of much wider application and is not in any manner qualified by the actual facts to which it was applied. In 41 I. C. 72,¹⁶ a case decided by the Lower Burma Chief Court, the suit was for the recovery of arrears of interest for the period 1st March 1916 to 3rd August 1916, on balance of the principal, at Re. 1-8-0 per cent. per mensem, alleged to be due under a regis-

tered deed of mortgage dated 17th May 1907. The mortgage-deed provided that the mortgagor would pay, until repayment of the loan advanced to him, interest at Re. 1-8-0 per cent. per mensem, on the 17th day of each month, and every month, on Rs. 2000 advanced, or any sum remaining unpaid. In dealing with the argument that the personal remedy as regards the principal being barred, the suit for the interest was liable to be dismissed as equally barred, the learned Judge observed :

"In the present case the claim for interest was made on a distinct agreement. I, therefore, think that although the personal remedy for the principal is barred in this case, the suit for the interest stands on a different footing."

In 21 Bom. 267,¹⁷ it was held that "the breach of a covenant, in a mortgage bond, to pay interest each year, which covenant is not confined to the fixed period of the mortgage, and is distinct from and independent of the claim of the mortgagee to recover the principal sum, and the performance of which is secured in a different manner, gives rise to a distinct cause of action which can be sued upon without suing for the principal."

In A.I.R. 1942 Pesh. 85¹⁸ a Division Bench of the Peshawar Judicial Commissioner's Court had to deal with a case in which, under the terms of the mortgage-deed, the mortgagee was given possession, but he let out the mortgaged premises to the mortgagor on the latter's agreeing to pay Rs. 10 per mensem as rent. The redemption was to take place two years after the mortgage and the mortgagor undertook to pay the rent every three months, he having to pay at an enhanced rate in case of default. The rent was declared to be a charge on the mortgaged property. On an application being made under O. 34, R. 6, for a personal decree, it was held that in the circumstances there was an independent contract to pay rent and that even if the rent be regarded as interest it was recoverable as being due under a special contract even if the principal was irrecoverable. I do not consider it necessary to multiply authorities on this subject. I think it may be taken as fairly well settled that where there is a separate and independent agreement to pay interest, the obligation to pay interest may be regarded as independent of the obligation to pay the principal debt, and, although there can be no liability for interest for the period subsequent to the time when the principal becomes irrecoverable by lapse of time,

14. ('25) 12 A.I.R. 1925 Mad. 1120; 48 Mad. 703; 91 I. C. 403, *B. R. Swamy Rao v. Official Assignee of Madras*.

15. ('35) 22 A.I.R. 1935 Lah. 672; 16 Lah. 640; 158 I. C. 238 (FB), *Puran Chand v. Har Parshad*.

16. ('17) 4 A. I. R. 1917 L. B. 9; 41 I. C. 72, *Thair Maistry v. K. N. I. A. Chetty Firm*.

17. ('97) 21 Bom. 267, *Yashwant Narayan Kamat v. Vithal Divakar*.

18. ('42) 29 A.I.R. 1942 Pesh. 85; 204 I. C. 509, *Haji Nathu v. Mst. Nikki Devi*.

action will lie for the recovery of interest alone for the period during which the principal was recoverable. In case of a mortgage effected by means of a registered mortgage-deed, where there is a separate and distinct agreement for the payment of interest, interest under this covenant will continue to run even after the personal covenant for payment of the principal has become unenforceable by lapse of time provided the mortgage-debt itself is still subsisting. Interest will become payable to the mortgagee, according to the terms of and in the manner provided by the mortgage-deed, so long as the mortgage-debt subsists. The mere circumstance that one mode of relief for the recovery of the principal has become barred by limitation will not affect the right of the mortgagee to the interest as it accrues due periodically under the terms of the mortgage-deed. The breach of the covenant for payment of the interest will take place as it falls due and a suit for compensation in respect of each breach can be maintained within six years of the date of such breach. The liability of the mortgagor for payment of interest as stipulated in the mortgage-deed cannot terminate, or be extinguished, so long as the mortgage-debt is subsisting and does not become irrecoverable altogether. In 1 Cal. W. N. 52¹⁹ the mortgage-deed, which was executed on 17 February 1880, provided for payment of the principal and interest at Re. 1-6-0 per cent. per mensem within one year. The suit was instituted on 19th June 1888, i. e., more than six years after the accrual of cause of action for the recovery of the principal. The question that their Lordships of the Judicial Committee had to decide was whether the claim for interest for six years prior to the suit was maintainable. Their Lordships answered this question in the affirmative. One of the contentions advanced was that there was no agreement for *post diem* interest and the question was whether interest for six years prior to the suit could not be awarded as compensation or damages. In answering this question their Lordships made the following observations:

"Supposing the construction put by the Court below on the deed to be correct, the appellants still asked why they should not recover six years' arrears of interest by way of damages. It was very difficult to see why. The *principal debt was not time-barred*, and it was not paid. Every day that it remained unpaid there was a breach of con-

tract, and the bar of time applied only to breaches occurring six years before suit."

The words that I have underlined (here italicised) are very important. In the case mentioned, a suit for personal relief in respect of the principal undoubtedly became barred by limitation on 17th February 1887. The suit was brought a little over 16 months after that. Evidently, therefore, when their Lordships said that the principal debt had not become time-barred, what they meant to convey was that the mortgage-debt was still subsisting and still capable of carrying interest. Where there is no debt capable of carrying interest in existence, no interest can, of course, fall due. Where, however, there is in existence a debt on which interest may accrue, it makes no difference at all to the liability of the debtor for interest that the creditor has lost one of the remedies for the recovery of his principal debt and can get satisfaction in respect of it only out of the mortgaged property.

The above discussion should point the way to the answer which ought to be given to the question referred to the Full Bench. If the stipulation for payment of interest in a mortgage-deed does not constitute an independent agreement, and is no more than a part of the contract for the payment of the principal, the mortgagee cannot get a personal decree for the recovery of the interest, even for the period of six years preceding the suit, in a case where his suit for the enforcement of the personal remedy in respect of the principal was barred by time at the time of the institution of the suit. There being one contract from which the liability for the principal and the interest arises, the cause of action arising from the breach of contract is not divisible or severable and the time for the recovery of both principal and interest must be deemed to begin to run from the date when the breach took place. If the covenant for payment of interest is an independent and separate agreement, the breach of such covenant will give rise to a separate cause of action, independently altogether of the cause of action arising on a breach of the covenant for the payment of the principal. A suit instituted within six years of such breach will obviously be within time, in view of the language of Art. 116, and cannot be held to be barred by limitation, merely because an action for compensation for breach of another independent covenant has become time-barred. The mortgagee is entitled to a personal decree for recovery of such interest

19. ('97) 19 All. 39 : 23 I. A. 138 : 1 C. W. N. 52 : 7 Sar. 88 (P. C.) Mathura Das v. Narind Bahadur Pal.

even though he has no subsisting right to get a personal decree for the recovery of the principal. It is hardly necessary for me to add that this is subject to the proviso that the mortgagee is not entitled to any relief in respect of interest falling due after the mortgage debt itself has become irrecoverable, because in that event his suit for sale itself will be liable to dismissal as barred by time and no occasion will arise for him to apply for a personal decree under O. 34, R. 6, Civil P. C. The conflict between the view taken in A. I. R. 1928 Lah. 653¹ and that taken in A. I. R. 1936 Lah. 387³ is, in my judgment, more apparent than real. In the former Shadi Lal C. J., observed as follows :

"It may be that the personal remedy for the principal debt could not be enforced after the expiry of six years from the date of the mortgage, but the debt being a charge on immovable property was not extinguished. As the debt existed even after the expiry of six years, the personal liability for the payment of interest under the covenant contained in the instrument of mortgage arose in the seventh year and also in each of the subsequent years until the expiry of the period for the recovery of the debt from the mortgaged property."

From the passage quoted above, it appears that their Lordships were resting their decision on the terms of the covenant in the particular mortgage-deed. Unfortunately, the terms of the covenant have not been reproduced in the judgment, nor was it possible to find out those terms from the record available in the High Court. If the mortgage-deed, with which their Lordships had to deal did contain a separate and an independent covenant for payment of interest, their decision cannot, as pointed out by Dalip Singh J. in A.I.R. 1936 Lah. 387,³ be said to be open to any exception. If, on the other hand, there was no separate and independent covenant in that mortgage-deed for payment of interest and their Lordships meant to lay it down, as a general rule of universal application, that quite apart from the terms of the mortgage-deed, a personal decree for interest for six years prior to the suit can be passed even though claim for a personal decree in respect of the principal has become barred by limitation, I must, with the profoundest respect, express my disagreement with the view taken by their Lordships. For the reasons already given, I would answer the question referred to the Full Bench in the manner indicated above.

Munir J. — I agree to the answer that my brother Achhru Ram proposes to return to the question referred to the Full Bench. In my opinion it is impossible to escape the legal, and also the logical, result that so long

as the debt exists and is enforceable by sale of the mortgaged property, the debt carries interest, and if the stipulation regarding the payment of interest is so worded that a suit to recover it would lie without barring under O. 2, R. 2, Civil P. C., a subsequent suit for recovery of the debt, the mortgagee, in the case of a registered mortgage-deed, is, under O. 34, R. 6 of the Code, entitled to a personal decree for interest for six years preceding the institution of the suit for sale, even though at that date the suit for recovery of the debt as an unsecured loan is barred by time. The principle that interest being merely accessory to the principal, cannot come into existence because of the death of the principal does not apply to such cases because, *ex hypothesi*, the principal is not dead to all intents and purposes and the liability of the mortgaged property to pay it exists as a legally enforceable obligation.

Marten J. — I agree with the answer proposed.

D.S./D.H.

Answer accordingly.

[Case No. 27.]

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FULL BENCH

**HARRIES C. J., ABDUR RAHMAN AND
MAHAJAN JJ.**

*Kartar Singh Sardar Jit Singh
Petitioner*

v.

Imperator.

Criminal Misc. Cases Nos. 68 of 1944 and 319 of 1943, Decided on 12th April 1944, from orders of Munir J., D/- 2nd February 1944.

(a) **Government of India Act (1935), S. 270—Applicability** — Section is not applicable to Court-martial.

Criminal proceedings contemplated in S. 270 are proceedings in the ordinary criminal Courts and not in special Courts which are the creation of Military Law. [P 109 C 1]

The section is not applicable to a Court-martial held under the Army Act in respect of British Officer attached to the Indian Army : *Confirmed* in ('45) 32 A.I.R. 1945 F. C. 21. [P 106 C 2]

(b) **Interpretation of Statutes** — Words in statute to be given their ordinary meaning and section its ordinary grammatical construction.

The words in a statute must be given their ordinary meaning and unless the Court is compelled to do otherwise, it must give a section its ordinary grammatical construction. [P 109 C 1]

(c) **Indian Army Act (1911), Applicability** — Military store-keeper is subject to Act and can be tried by Court-martial.

A military store-keeper attached to or employed with military forces raised in British India must, by force of Ordinance No. 10 [X] of 1941 be

deemed to be on active service for the purposes of the Indian Army Act and is, therefore, subject to the provisions of that Act and can be tried by a Court-martial. [P 109 C 2]

(d) Indian Army Act (1911), S. 62 — Person on active service—Trial of, by Court-martial—Central Government or Commander-in-Chief can empower convening of Court-martial.

The Central Government or the Commander-in-Chief can empower an officer to convene a Court-martial to try a person whether the latter be on active service or not. The section does not mean that the Central Government or the Commander-in-Chief loses its or his right to empower an officer to convene a Court-martial when the troops are on active service. The Central Government or the Commander-in-Chief can empower an officer to convene a Court-martial at all times, whereas the officer commanding forces in the field can only empower an officer to convene such a Court on active service. [P 110 C 1]

(e) Criminal P. C. (1898), S. 491 — Court-martial — Conviction on no real evidence—High Court cannot interfere — Case is different if Court-martial convicts without hearing evidence.

Whether there is evidence to sustain a conviction is a question of law and the members of a Court-martial are the sole Judges of both law and fact. The High Court under S. 491 cannot interfere if they make a mistake of law and convicting on no real evidence would be a pure mistake of law. It would be different if the Court-martial convicts an accused person without hearing any evidence. The High Court can then hold that the detention of such a man was illegal because the proceedings of the Court-martial would be irregular on the face of them: (1801) 1 East. 306, *Rel. on*; (1914) 1 K. B. 77, *Disting.* [P 110 C 2]

Cr. P. C.

(41) Chitaley S. 491, N. 7.

(41) Mitra, Page 1596, Note 1298.

(f) Indian Army Act (1911), S. 69—Jurisdiction of Court-martial—First information report lodged — Magistrate taking cognizance of offence—Prescribed military authority subsequently deciding that proceedings should be instituted before Court-martial — Latter has jurisdiction to try offence.

In cases where an ordinary criminal Court and a Court-martial have each jurisdiction in respect of an offence, it cannot be said that the Court-martial has no jurisdiction to try an offence because the first information report in respect thereof was lodged by persons other than the prescribed military authority and cognizance was taken by a Magistrate before the decision of the prescribed military authority as to before which Court the proceedings should be instituted.

[P 111 C 2; P 112 C 1]

J. L. Kapur, Harbans Singh and S. Gurdev Singh — for Petitioner.

Sir Brajindar Mitter, Advocate-General for India and R. C. Soni for Advocate-General, Punjab — for the Crown.

Harries C. J. — Criminal Misc. Nos. 68 of 1944 and 319 of 1943 are two petitions under S. 491, Criminal P. C., praying for the release of the petitioners who are said to be illegally detained, as a result of convictions

and sentences by Summary General Courts-martial. These cases have been referred by a learned Single Judge of this Court to this Bench for hearing. In Cri. Misc. No. 77 of 1944* Blacker J. who is hearing the case has referred a question of law for decision by a Full Bench. The question is whether S. 270, Government of India Act, is applicable to Courts-martial held under the Army Act in respect of British Officers attached to the Indian Army. I may observe that the question whether S. 270, Government of India Act, is applicable to Courts-martial is common to all the three cases and the only point of difference between the cases is that in Cri. Misc. No. 77 of 1944* the petitioner is a British Officer attached to the Indian Army, whereas in Cri. Misc. Nos. 68 of 1944 and 319 of 1943 the petitioners are Indians who were employed by the Army authorities and were subject not to the English Army Act but to the Indian Army Act. The petitioner in Cri. Misc. No. 77 of 1944* is A. W. Meads, who was a Captain holding the rank of a temporary Major in the Royal Engineers and who was attached to No. 1, works Service E and M Group Indian Engineers stationed at Kohat. He was tried by a Court-martial held in the Lahore Cantonment on 12th October 1942 and was convicted under S. 17, Army Act,† for misapplication of public funds and sentenced two years' imprisonment and cashiered.

The petitioner filed a petition in this Court under S. 491, Criminal P. C., and before Blacker J. it was urged that the act complained of was committed by the petitioner in the execution of his duty or in the purported execution of such duty. That being so, it was urged that no criminal proceedings could be taken against him without the consent of the Governor-General in his discretion as the Officer was employed in connection with the affairs of the Government of India. It was contended that as no such consent had been obtained, the Court-martial had no jurisdiction to hear the case and therefore the conviction and sentence were wholly illegal and the petitioner was unlawfully detained. Criminal Misc. No. 68 of 1944 is a petition under S. 491, Criminal P. C., filed on behalf of one Kartar Singh, who was employed as a Civilian Assistant Store Keeper in the Ordnance Depot, Rawalpindi. He was tried by a Court-martial at Rawalpindi and on 18th February 1943 he was convicted

* Reported in (46) 33 A.I.R. 1946 Lab. 112 *infra*.

† See the English Army Act, 1881 (44 & 45 Vict., Ch. 58)—*Ed.*

of an offence under S. 161, Penal Code, and sentenced to two years' rigorous imprisonment and dismissal from the service. In this case it is also submitted that the act done by the petitioner Kartar Singh was done in the execution of his duty or in the purported execution of his duty and therefore the consent of the Governor-General was necessary before he could be tried. As such consent was not obtained, the trial was wholly without jurisdiction and his detention as a result of the conviction and sentence passed by the Court-martial was illegal. Criminal Misc. No. 319 of 1943 is a petition under S. 491, Criminal P. C., preferred on behalf of one Gobind Ram, who was a Civilian Store Keeper in the North Western Army Depot at Rawalpindi. He was found guilty by a Court-martial on a charge under S. 39 (1), Indian Army Act, in that he on active service so negligently performed his duties as a store-keeper attached to the North Western Army Stores as to be unable to account for the stores to the value of about Rs. 29,000. He was sentenced to five years' rigorous imprisonment, but the sentence was subsequently reduced to three years' rigorous imprisonment. Again it was urged that the trial was wholly without jurisdiction by reason of the failure to obtain the consent of the Governor-General under S. 270, Government of India Act, and that therefore his detention in consequence of his conviction and sentence was illegal. I shall first deal with the question whether S. 270, Government of India Act, 1935, applies to Courts martial convened under either the English Army Act or the Indian Army Act. The learned Advocate-General of India who appeared for the Crown conceded that there was no real difference for this purpose between a Court-martial convened under the English Army Act and a Court-martial convened under the Indian Army Act. He further conceded that proceedings before Courts-martial were in the nature of criminal proceedings and that a Court-martial could properly be described as a Court. Lastly, he admitted that all these petitioners were servants of the Crown employed in connexion with the affairs of the Government of India. His contention, however, was that proceedings before a Court-martial were not such criminal proceedings as were contemplated in S. 270, Government of India Act. The section is in these terms :

"(1) No proceedings civil or criminal shall be instituted against any person in respect of any act done or purporting to be done in the execution of his

duty as a servant of the Crown in India or Burma before the relevant date, except with the consent, in the case of a person who was employed in connection with the affairs of the Government of India or the affairs of Burma, of the Governor-General in his discretion, and in the case of a person employed in connection with the affairs of a Province, of the Governor of that Province in his discretion.

(2) Any civil or criminal proceedings instituted, whether before or after the coming into operation of this Part of this Act, against any person in respect of any act done or purporting to be done in the execution of his duty as a servant of the Crown in India or Burma before the relevant date shall be dismissed unless the Court is satisfied that the acts complained of were not done in good faith, and, where any such proceedings are dismissed, the costs incurred by the defendant shall, in so far as they are not recoverable from the persons instituting the proceedings, be charged, in the case of persons employed in connection with the functions of the Governor-General in Council or the affairs of Burma, on the revenues of the Federation, and in the case of persons employed in connection with the affairs of a Province, on the revenues of that Province.

(3) For the purposes of this section—the expression "the relevant date" means, in relation to acts done by persons employed about the affairs of a Province or about the affairs of Burma, the commencement of Part III of this Act and, in relation to acts done by persons employed about the affairs of the Federation, the date of the establishment of the Federation."

* * * *

Section 271 of the Act which immediately follows is in these terms :

"(1) No Bill or amendment to abolish or restrict the protection afforded to certain servants of the Crown in India by S. 197, Criminal P. C., or by Ss. 80 to 82, Civil P. C., shall be introduced or moved in either Chamber of the Federal Legislation without the previous sanction of the Governor-General in his discretion, or in a Chamber of a Provincial Legislature without the previous sanction of the Governor in his discretion.

(2) The powers conferred upon a Local Government by the said S. 197 with respect to the sanctioning of prosecutions and the determination of the Court before which, the person by whom and the manner in which, a public servant is to be tried, shall be exercisable only —

(a) in the case of a person employed in connection with the affairs of the Federation, by the Governor-General exercising his individual judgment; and

(b) in the case of a person employed in connection with the affairs of a Province, by the Governor of that Province exercising his individual judgment :

Provided that nothing in this sub-section shall be construed as restricting the power of the Federal or a Provincial Legislature to amend the said section by a Bill or amendment introduced or moved with such previous sanction as is mentioned in sub-s. (1) of this section. . . ."

It will be seen that S. 270, Government of India Act, gives servants of the Crown, which would include persons subject to the Army Acts, certain protection before the relevant date which is defined in sub-s. (3) of that section in relation to acts done by persons

employed about the affairs of Federation as the date of the establishment of the Federation. Section 5, sub-s. (1), Government of India Act, provides that

"It shall be lawful for His Majesty, if an address in that behalf has been presented to him by each House of Parliament and if the condition hereinafter mentioned is satisfied, to declare by Proclamation that as from the day therein appointed there shall be united in a Federation under the Crown, by the name of the Federation of India, —

(a) the provinces hereinafter called Governors' Provinces; and

(b) the Indian States which have acceded or may thereafter accede to the Federation;"

No proclamation has yet been issued under S. 5, sub-s. (1), Government of India Act, and therefore all acts committed by servants of the Government of India if they are acts done or purporting to be done in the execution of the duty of such servants are governed by the provisions of S. 270 of the Act as they are acts done before the relevant date which has yet to be fixed. S. 271, Government of India Act, deals with protection of the Government servants in respect of acts done after the relevant date. The relevant date in relation to acts done by persons employed in the affairs of a Province is the date of the commencement of Part III of this Act which was 1st April 1937. It follows, therefore, that S. 271 applies to acts now done by persons employed about the affairs of a Province but it has no application as yet to acts done by the servants of the Crown in connection with the affairs of the Government of India. A comparison of these two sections shows that the British Parliament intended that servants of the Crown should be afforded a far greater degree of protection in respect of acts committed before the relevant date than would be given to them in respect of acts done after the relevant date. For acts done after the relevant date they were to have the protection given by S. 197, Criminal P. C., and by ss. 80 to 82, Civil P. C., and it was further provided that these sections should not be abolished or amended so as to restrict the protection afforded by them by either Chamber of the Federal legislation without the previous sanction of the Governor-General or by a Provincial Legislature without the previous sanction of the Governor. In short, after the relevant date the protection afforded by these sections in the Criminal and Civil Procedure Codes, was to continue unless the sanction of either the Governor-General or a Governor was obtained for any enactment to restrict such protection.

It is clear that the protection afforded to

Government servants by S. 271, Government of India Act, is a protection in connection with proceedings in the ordinary civil and criminal Courts of India and that this section clearly gives servants of the Crown no protection in proceedings before a Court-martial, as the Codes of Civil and Criminal Procedure have no application whatsoever to such Courts. It was strongly urged by the Advocate-General of India that the proceedings contemplated in S. 270, Government of India Act, must have been the same proceedings as were contemplated in S. 271 of that Act, namely, civil or criminal proceedings in the ordinary Courts of land and not proceedings in Courts-martial, that is in Courts created by the English or Indian Army Acts. It appears to me that this contention of the Advocate-General is well founded. I cannot see any reason why protection should be offered to servants of the Crown in respect of acts done before the relevant date in proceedings in Courts-martial when no such protection is given in respect of such act if committed after the relevant date. It is well known that fears were entertained that when the system of Government in this country was being radically altered suits and proceedings might be brought to harass Government servants who had committed acts in the course of their duty before the relevant date. It seems that S. 270, Government of India Act, was introduced to meet such fears and that section does give all Government servants a very substantial measure of protection in respect of acts done before the relevant date. The measure of protection given afterwards is very much less. If it was intended to afford Government servants protection in respect of proceedings before a Court-martial in respect of acts done before the relevant date, it is difficult to understand why it was not thought necessary to afford some though a lesser measure of protection in respect of such acts committed after the relevant date. Further, it appears to me that sub-s. (2) of S. 270 indicates that the civil and criminal proceedings therein mentioned mean proceedings in the ordinary Courts of the land. The sub-section provides that where such proceedings are instituted against any person in respect of acts done or purporting to be done in the execution of his duty as a servant of the Crown before the relevant date the proceedings shall be dismissed unless the Court is satisfied that the acts complained of were not done in good faith. In other words, in such proceedings that fact that the

act was done in good faith is a complete defence and further it is provided that where the proceedings are dismissed by reason of the fact that the act was done in good faith, the costs incurred by the defendant shall in so far as they are not recoverable from the persons instituting the proceedings be charged against either the revenues of the Federation or the revenues of the Province.

This sub-section provides a complete defence, and when that defence is established, the costs of the successful defendant in so far as they are not recoverable from the persons instituting the proceedings shall be charged against either the Federal or the Provincial Government. In enacting this section, it seems to me to be tolerably clear that the Parliament could not have had in mind Courts-martial. Could it ever have been intended that good faith would be a complete defence to charges preferred before a Court-martial? For example, S. 27, Indian Army Act, provides that any person subject to that Act who disobeys the lawful command of his superior officer on conviction by Court-martial shall be punished with death or with such less punishment as is in this Act mentioned. Assume, an officer or a soldier is ordered to do a certain act on active service by the lawful command of a superior officer and that he disobeys that command in the course of his duty: Could it have been contemplated that it would be a defence to a charge of disobeying a lawful command that the officer or soldier concerned honestly thought that it was in the interest of the force to which he belonged that he should disobey the command in question? I have no doubt that a Court-martial would pay due regard to the particular circumstances in which the lawful order was disobeyed in considering the question of sentence but it appears to me that good faith could never afford a defence to this charge under the Indian Army Act. However, if S. 270, Government of India Act, applies, then good faith would be a defence if the act was committed before the relevant date. If good faith provides a defence in all cases in proceedings before a Court-martial before the relevant date, it appears to me that it would be practically impossible to maintain discipline in either the English Army in India or in the Indian Army. This defence of good faith to my mind strongly suggests that what was contemplated in the section was a proceeding in either an ordinary civil or criminal Court in India.

Sub-section (2), Government of India Act,

also provides for the payment of costs incurred by the defendant where the proceedings are dismissed against him. The use of the word 'defendant' would suggest that this provision applies only to civil proceedings but as the sub-section is worded, it would appear that the word 'defendant' is intended to cover a person defending himself in either civil or criminal proceedings. The statute is of course an English statute and a person accused of the misdemeanour is properly referred to as a 'defendant'. In India a person who has successfully defended himself in a criminal Court is not entitled to costs but in certain cases, for example, under S. 250, Criminal P. C., he is entitled to compensation. Even if this sub-section covers both civil and criminal proceedings, it appears to me that it was never intended to cover proceedings of a criminal nature before a Court-martial. The sub-section contemplates recovery of costs firstly from the person instituting the proceedings. Could Parliament have contemplated the recovery of costs from an officer who had instituted proceedings against a soldier or another officer which were eventually dismissed by a Court-martial? Further, it appears to me that even if a person obtained an order for payment of costs from a Court-martial there would be no means whatsoever of executing such an order. This provision as to costs also strongly suggests that what the Legislature had in mind was not a Court-martial but one of the ordinary Courts of the land. Again, the British Army Act and the Indian Army Act provide for the setting up of Courts so that offences committed by persons subject to these acts should be tried immediately and the offender speedily punished, if found guilty. It has always been regarded as essential in the interests of discipline that there should be no delay whatsoever between an accusation and the trial of the offender. A speedy trial is particularly essential when troops are on active service but if S. 270, Government of India Act, applies to Court-martial proceedings, then a speedy trial would become impossible. If a soldier was charged in respect of an act done or purporting to be done in the execution of his duty whilst on active service, there would inevitably be a long delay before he could be brought to trial because the consent of the Governor-General would in every case have to be obtained. Such delay would render the maintenance of discipline difficult, if not impossible. The necessity for speedy punishment is stressed in the pream-

ble of the British Army Act, the material portion of which preamble is as follows :

"And whereas no man can be forejudged of life or limb, or subjected in time of peace to any kind of punishment within the realm by martial law, or in any other manner than by the judgment of his peers, and according to the known and established laws of this realm; yet nevertheless it being requisite for the retaining all the before-mentioned forces, and other persons subject to military law or to the Air Force Act, in their duty that an exact discipline be observed, and that persons belonging to the said forces who mutiny or stir up sedition, or desert Her Majesty's service, or are guilty of crimes and offences to the prejudice of good order and military or air force discipline, *be brought to a more exemplary and speedy punishment than the usual forms of the law will allow.*"

In my view, if the provisions of S. 270, Government of India Act, applied to Courts-martial, then the whole object of a Court-martial, namely, to bring the offender to a more exemplary and speedy punishment than the usual forms of the law will allow would be completely defeated. It is to be observed that in S. 2, English Army Act, it is provided that this Act shall continue in force wholly for such time and subject to such provisions as may be specified in an annual Act of Parliament bringing into force or continuing the same. The Army Act as is well known is kept alive by an annual Act and it is by such annual Act that any amendments are made. If S. 270, Government of India Act, be held to apply to Courts-martial under the British Army Act, then it must be held that this latter Act has been amended by the Government of India Act which amendment was intended to last as long as that section of the Government of India Act lasts. The learned Advocate General of India urged that in the British Army Act it was clearly intended that any amendment should be made in the annual Act and that being so it should be held that the British Parliament could never have intended to amend the Army Act by the Government of India Act. There is considerable force in this contention.

Further, it appears to me that if it be held that S. 270, Government of India Act, applies to proceedings before a Court-martial, it must also be held to apply to the more summary proceedings which are contemplated in both the British and the Indian Army Acts. In S. 20, Indian Army Act, the Commander-in-Chief in India may, subject to the control of the Central Government, specify the minor punishments to which persons subject to this Act shall be liable without the intervention of a Court-martial,

and the officer or officers by whom, and the extent to which such minor punishments may be awarded. Under this section a Commanding Officer may award a private soldier up to 28 days' imprisonment and a Squadron Battery or Company Commander can award up to ten days' confinement to the Lines. Other officers can give punishments of varying severity. The whole purpose of giving more junior officers the right to punish is to ensure that punishment follows swiftly after the commission of a crime. The proceedings before the Commanding Officer of the Battalion or a Squadron, Battery or Company Commander would certainly be proceedings of the criminal nature and if S. 270, Government of India Act, applies to such proceedings, then they would become practically impossible or, if not impossible, useless. The whole object of these summary proceedings would be defeated and the maintenance of discipline rendered difficult, if not impossible. To apply the provisions of S. 270, Government of India Act, to such proceedings would in my view completely defeat the object for which these provisions were enacted. Again if the section applies to proceedings of a criminal nature before a military Court, it would apply wherever the officer or soldier was serving. Courts-martial and Commanding Officers can try military offences no matter where the force may be. I find it difficult to hold that it was ever the intention of Parliament that in certain classes of cases the consent of the Governor-General was necessary before an Indian soldier could be Court-martialled or tried by his Commanding Officer or Company Commander for a military offence committed for example in Italy, the Middle East or Burma. Such in my view could never have been the intention of the British Parliament.

The learned Advocate-General of India further pointed out that in the Government of India Act care was taken that there should be no interference whatsoever with the British Army Act and that is so; but of course there was nothing whatsoever to prevent the British Parliament altering the provisions of the British Army Act if it so desired. The limitation imposed on legislation affecting the Army Act in S. 110, Government of India Act, is a limitation imposed on the Federal or the Provincial Legislature. The learned Advocate-General of India strongly urged that though the words "civil or criminal proceedings" are wide enough to cover proceedings of a criminal nature before Military Courts and the word "Courts"

is wide enough to cover a Court-martial or a summary Court under Military law, nevertheless the words must be construed having regard to the whole scheme of the Act. The learned Advocate-General referred to Item 1 in List 2 of Sch. VII, Government of India Act, which gives a Provincial Legislature power to legislate on the constitution and organisation of all Courts except the Federal Court and Art. 2 of that List gives the Provincial Legislature power to legislate concerning the jurisdiction and powers of all Courts except the Federal Court in respect of any of the matters in the list. The phrase "all Courts" would be wide enough to cover Courts-martial but it is clear from the general frame of the Act that all Courts in these articles could never include Courts-martial. The phrase "all Courts" must be construed in relation to other provisions of the Act and when that is done, it is clear that the phrase "all Courts" was meant to cover the ordinary civil and criminal Courts in the Province. Similarly, it is urged that the phrase "civil and criminal proceedings" and the word "Court" in s. 270 must be construed in the light of other provisions of the Act and when this is done, it is clear that they do not cover Military Courts but were only intended to cover the ordinary civil and criminal Courts of land. On behalf of the petitioners, it was urged that the phrase "criminal proceedings" is wide enough to cover proceedings in a Court-martial or proceedings before Officers who are entitled to try offenders and to sentence them under Military law. That being so, it was urged that the ordinary meaning must be given to the phrase, even if it led to the most startling and possibly ridiculous results. It is true that the words in a statute must be given their ordinary meaning and unless the Court is compelled to do otherwise, it must give a section its ordinary grammatical construction. There can be no doubt about the correctness of these propositions but in my judgment s. 270 cannot be divorced from s. 271 and the other provisions of the Act and, that being so, I am bound to hold that criminal proceedings contemplated in s. 270 are proceedings in the ordinary criminal Courts and not in special Courts which are the creation of Military law.

In Cri. Misc. Nos. 68 of 1944 and 319 of 1943 it was also urged before us that the petitioners were not subject to military law. They were military store-keepers employed by the Army authorities but, in my view, these persons were clearly subject to military

law and could be tried by a Court-martial. On 6th December 1941 the Governor-General promulgated an Ordinance No. 10 [X] of 1941 under powers given to him by an Act of Parliament 3 & 4, George VI, Chap. 63. The Ordinance was promulgated as it was thought necessary to declare that certain persons should be deemed to be on active service for the purpose of the British and Indian Army Acts. Section 1, sub-s. (2), makes the Ordinance applicable to British subjects and servants of the Crown in any part of India and to all members of and persons attached to, employed with or following any military or air force raised in British India, wherever they may be. By s. 2 of the Ordinance such persons were to be deemed so long as the present hostilities continued to be on active service for the purposes of the British and Indian Army Acts.

There can be no doubt that these two petitioners were persons attached to or employed with military forces raised in British India and that being so they must be deemed to be on active service for the purposes of the Indian Army Act. They were, therefore, subject to the provisions of the Indian Army Act and could be tried by a Court-martial. Mr. Jiwan Lal Kapur contended that these persons were treated as ordinary civil servants but in my view that cannot affect the question. They were clearly amenable to military law and therefore their trial by Court-martial was legal. It was also urged that the trial was illegal by reason of the fact that the Courts-martial in each case were not properly convened. The Courts-martial which tried these two petitioners were convened by officers empowered to convene such a Court by an order of the Central Government or the Commander-in-Chief. Mr. Jiwan Lal Kapur, however, urged that as the petitioners were deemed to be on active service, such officers could not convene a Court-martial. Section 62, Indian Army Act, provides that the following authorities shall have power to convene a summary general Court-martial namely :

(a) an officer empowered in this behalf by an order of the Central Government or of the Commander-in-Chief in India;

(b) on active service, the officer commanding the forces in the field, or any officer empowered by him in this behalf;

(c) an officer commanding any detached portion of His Majesty's troops upon active service when in his opinion it is not practicable, with due regard to discipline and the exigencies of the service, that an offence

should be tried by an ordinary general Court-martial.

Mr. Kapur's argument was that as the petitioners were on active service, the Courts-martial could only be convened by the officer commanding the forces in the field or any officer empowered by him in that behalf and could not be convened by an officer empowered by an order of the Central Government or of the Commander-in-Chief in India. In my view, the Central Government or the Commander-in-Chief can empower an officer to convene a Court-martial to try a person whether the latter be on active service or not. There is a general power given to the Central Government and the Commander-in-Chief. On active service others may convene a Court-martial who cannot do it in peace time. In my view the section does not mean that the Central Government or the Commander-in-Chief lose their right to empower an officer to convene a Court-martial when the troops are on active service. The Central Government or the Commander-in-Chief can empower an officer to convene a Court-martial at all times, whereas the officer commanding forces in the field can only empower an officer to convene such a Court on active service. In my view, there is no force in this contention and that the Courts were not properly convened and the legality of the trial cannot be challenged on this ground. A point was also taken that the sentence imposed by these Courts-martial had not been properly confirmed but Mr. Kapur conceded that if the Courts were properly convened, then the sentences were properly confirmed. Lastly, it was urged that there was no evidence in the cases of Gobind Ram and Kartar Singh upon which they could be convicted and that being so it was urged that the trial was without jurisdiction and the convictions and sentences were wholly illegal. Great reliance was placed on a paragraph which appears at p. 144 of Chap. 8 of the Manual of Military Law which is in these terms :

"As a general rule the High Court will look to see whether the inferior tribunal had jurisdiction, and whether its proceedings are upon their face regular and according to law : but it will not consider whether that tribunal has correctly decided some question of law or of fact which it was its duty to decide unless perhaps there was before it no evidence at all to support its decision."

Mr. Jiwan Lal Kapur took us through part of the evidence in the case of Gobind Ram and it is perfectly clear that there was evidence upon which the petitioner could have been convicted of the charge upon

which he was ultimately convicted. Whether this Court would have convicted him upon that evidence is wholly immaterial. There was evidence which the Court-martial believed and that being so there is no foundation whatsoever for Mr. Jiwan Lal Kapur's contention with regard to Gobind Ram. Mr. Jiwan Lal Kapur did not refer us to the evidence against Kartar Singh and we were not asked to hold that after a perusal of that evidence there was no evidence to sustain a conviction. I am extremely doubtful whether this Court in proceedings under S. 491, Criminal P. C., could go into this question of evidence. Whether there is evidence to sustain a conviction is a question of law and the members of a Court-martial are the sole Judges of both law and fact. In my view this Court could not interfere if they had made a mistake of law and convicting on no real evidence would be a pure mistake of law. It would of course be different if the Court-martial convicted an accused person without hearing any evidence at all. This Court could then hold that the detention of such a man was illegal because the proceedings of the Court-martial would be irregular on the face of them. If, on the other hand, evidence was taken which in the view of the Court-martial was sufficient to maintain a conviction then the proceedings would be regular and the mistake, if any, would be a mistake of law. The learned Advocate General of India relied on the case in (1801) 1 East. 306¹ at p. 315. Grose J. observed :

"It was properly admitted that the Court-martial had authority to try the offender and inflict punishment according to the nature and degree of the offence as regulated by the law of the land. Then taking that to be so, the answer to the objection made to this return is, that according to the law of this land the Court-martial might under certain circumstances have inflicted the punishment which they have awarded for this offence, that is, if the principal had been convicted of the felony, and this party had been tried as the accessory under the statute. But it is said that this does not so appear from the face of the return. That however is an objection in error, and we do not sit now as a Court of error. It is enough that we find such a sentence pronounced by a Court of competent jurisdiction to enquire into the offence, and with power to inflict such a punishment. As to the rest we must therefore presume *omnis rite acta*."

Le Blanc J. at p. 317 observed :

"The principal question is whether a party who is in custody under the sentence of a Court of competent jurisdiction, and is brought up here upon a writ of *habeas corpus*, be entitled to his discharge on the ground, that it does not appear on the face of the return that certain facts existed which are contended to be necessary to warrant such a sen-

1. (1801) 1 East. 306, Rex v. John Suddis.

tence. It is not denied that the Court-martial had power to try the offender; but it is contended, that the words alluded to in the articles of war according to the nature and degree of the offence . . . restrained the Court to pass such a sentence as was conformable to the law of England in the like case. But I cannot accede to that construction. It seems to me to have been intended to give the Court-martial a discretionary power of inflicting punishment on the offender, having regard to the enormity of the offence. This gets rid of the objection as to the principal not appearing to have been convicted. But another objection is, that it does not appear that the party was charged with the offence of which he was convicted. To which the answer is, that it is sufficient for the officer having him in his custody to return to the writ of *habeas corpus*, that a Court having a competent jurisdiction had inflicted such a sentence as they had authority to do, and that he holds him in custody under that sentence."

It appears to me from this case that this Court cannot go into the question of sufficiency of the evidence. The Crown justifies the detention of these two petitioners on the ground that they have been convicted and sentenced by Courts-martial. I have already held that the Courts-martial were properly convened and there is no doubt whatsoever that the Courts had jurisdiction to try the petitioners upon the charges upon which they were convicted. Their convictions were, therefore, by competent Courts and that is a sufficient answer to the petition under S. 491, Criminal P. C. In any event, as I have already said, there was evidence in the case of Gobind Ram and it has not been shown to us that there was no evidence in the case of Kartar Singh. Reliance was placed by Mr. Jiwan Lal Kapur upon the case in (1914) 1 K. B. 77² and upon certain observations of Ridley J. at p. 81. That was a case of extradition. At p. 81 the learned Judge observed :

"The question, therefore, is had the Magistrate jurisdiction in this case? We must assume that the Secretary of State has rightly issued his requisition, but if it appeared that the Magistrate acted without jurisdiction this Court would interfere. Such a case would arise if the Magistrate acted without having any evidence before him at all, and such a case was considered in *In re Arton* (No. 2)³ in which the question was whether the fraudulent falsification of accounts which was charged in that case was in itself an offence which was equivalent to that which was expressed in the French treaty."

It appears to me that cases relating to extradition cannot be of any assistance to the petitioners in this case because those cases turned on the Extradition Act, 33 & 34 Vic. Chap. 52 which provided that:

"In the case of a fugitive criminal accused of an extradition crime, if the foreign warrant authorising

the arrest of such criminal is duly authenticated, and such evidence is produced as (subject to the provisions of this Act) would, according to the law of England, justify the committal for trial of the prisoner if the crime of which he is accused had been committed in England, the Police Magistrate shall commit him to prison, but otherwise shall order him to be discharged."

It will be seen from the terms of this section that the Magistrate cannot commit him to prison unless such evidence is produced as would according to the law of England justify the committal for trial of the prisoner if the crime had been committed in England. In other words, whether there is evidence to maintain a conviction goes to the root of the Magistrate's jurisdiction and therefore in a *habeas corpus* application the Court would have to consider whether there was evidence and if there was not it would have to hold that the Magistrate acted without jurisdiction. These extradition cases are clearly distinguishable from the present cases and afford the petitioners no assistance. Lastly, it was urged that the Court-martial trying Gobind Ram and Kartar Singh had no jurisdiction by reason of the fact that the proceedings had been instituted in the ordinary criminal Courts. In the case of Gobind Ram the first information report had been lodged by Captain White, the Garrison Engineer, and in the case of Kartar Singh the first information report had been lodged by an Inspector, Indar Singh, of the Defence Department. It appears that a Magistrate took cognizance of these offences but they were eventually withdrawn from the ordinary criminal Courts to be tried by Courts-martial. This was done under the provisions of S. 69, Indian Army Act, which provides that when a criminal Court and Court-martial have each jurisdiction in respect of an offence, it shall be in the discretion of the prescribed military authorities to decide before which Court the proceedings shall be instituted and if that authority decides that they shall be instituted before a Court-martial to direct that the accused person shall be detained in military custody.

Rule 167 lays down who the prescribed military authority is, and such authority is the officer commanding the army, army corps, division, brigade or station in which the accused person is serving. Both the accused persons were serving in Rawalpindi and it is conceded that neither Captain White nor Inspector Indar Singh could be described as the prescribed military authority. Although the proceedings first took place in the ordinary criminal Court, it is admitted that

2. (1914) 1 K. B. 77 : 83 L. J. K. B. 212 : 109 L. T. 986, *King v. Governor of Brixton Prison*.

3. (1896) 1 Q. B. 509 : 65 L. J. M. C. 50 : 74 L. T. 249 : 44 W. R. 351.

when they were reported to the prescribed military authority, he ordered that they should be instituted in military Courts. Section 449, Criminal P. C., was no doubt enacted to meet such cases as the present and, in my view, it cannot be said that the military Court had no jurisdiction because first information reports were lodged and the cases came before Magistrates. This happened before the prescribed military authority could have decided where the cases should be instituted and when he did so decide, the cases were thereafter properly conducted under the Indian Army Act. For the reasons, which I have given, I can see no ground for holding that either Gobind Ram or Kartar Singh are improperly or illegally detained, and I would, therefore, dismiss the petitions in Cri. Misc. No. 68 of 1944 and No. 319 of 1943. I would also answer the question submitted to this Bench by Blacker J. in Cri. Misc. No. 77 of 1944* by saying that S. 270, Government of India Act, is not applicable to a Court-martial held under the Army Act in respect of a British officer attached to the Indian Army. Let the record in this latter case be returned to Blacker J. with the answer indicated above. I would grant a certificate in each of these cases under S. 205, Government of India Act.

Abdur Rahman J. — I agree.

Mahajan J. — I also agree.

V.R./D.H. *Petitions dismissed.*

*Reported in (46) 33 A.I.R. 1946 Lah 112 *infra*.

[Case No. 28.]

A. I. R. (33) 1946 Lahore 112

BLACKER J.

Captain A. W. Meads—Petitioner

v.

Imperator.

Criminal Misc. No. 77 of 1944, Decided on 3rd May 1944.

(a) Criminal P. C. (1898) S. 491—Admission of wrong evidence by Court-martial is no ground for order under S. 491.

The admission of evidence, whether right or wrong, by Court-martial is clearly a matter within the jurisdiction of the Court and cannot possibly be made a ground for an order under S. 491.

[P 113 C 2]

Cr. P. C. —

(41) Chitale, S. 491 N. 7.

(41) Mitra, Page 1596 N. 1298.

(b) Criminal P. C. (1898), S. 491—Conviction by Court-martial—High Court cannot enquire into sufficiency of evidence.

The High Court cannot enquire into the sufficiency of the evidence on which a conviction can be based by the Court-martial, so long as there is evidence. (46) 33 A.I.R. 1946 Lah. 103, *Foll.*

[P 113 C 2]

(c) English Army Act (1881, 44 & 45 Vict., Ch. 58), S. 49 — Applicability of ordinance 10 [X] of 1941 — All individuals of body of force on active service by virtue of Ordinance — Officer in command of such body of force is empowered to convene Field General Court-martial.

As all the individuals composing a force in India are deemed to be on active service by virtue of the Ordinance, it follows that the force itself must also be deemed to be on active service. Therefore an officer commanding such a force is an officer in immediate command of a body of forces on active service within the meaning of S. 49 and therefore empowered to convene a Field General Court-martial. [P 114 C 2]

(d) English Army Act (1881), S. 159—Jurisdiction to convene Court-martial — Offence committed in district R—Offender stationed at L in another district—Officer having jurisdiction over latter district can convene Court-martial.

An offence was committed in the Military District of R. At the time the Court-martial was convened and held, the offender was actually stationed at L in another district within the jurisdiction of the officer who convened the Court-martial :

Held, that the officer had jurisdiction to convene the Court-martial. [P 114 C 2]

(e) English Army Act (1881, 44 & 45 Vict. Ch. 58), S. 49 and R. 123 made under S. 70—Rule is binding on all Courts.

Rule 123 of the Rules of Procedure made under S. 70, Army Act, is not only binding on the Court-martial itself, but has the force of law and is binding on all Courts.

Consequently where an application is made to a High Court under S. 491, Criminal P. C., by a person convicted by a Field General Court-martial, the opinion of the Officer that it is not practicable that an ordinary General Court-martial should be held is binding on the High Court. [P 115 C 2]

(f) Criminal P. C. (1898), S. 561A — Scope—Section does not extend High Court's jurisdiction to matters not already inherently within that jurisdiction—Person convicted by Court-martial applying under S. 491, Criminal P. C.—Petition dismissed as conviction held to be legal—High Court is *functus officio* and cannot pass any order under S. 561A as case before Court-martial is not matter within High Court's jurisdiction.

There is no doubt that the terms of S. 561-A are wide but they do not extend the jurisdiction of High Court to matters which are not already inherently within that jurisdiction. Where a person convicted by a Court-martial applies to the High Court under S. 491, Criminal P. C., the subject matter of the case by virtue of which the petitioner is imprisoned, is not a matter within the jurisdiction of the High Court at all. It only comes temporarily within its jurisdiction by reason of its extraordinary powers to interfere under S. 491, if the legality of the proceedings is questioned.

The High Court dismissed a petition under S. 491, Criminal P. C., of the petitioner who was convicted by a Court-martial and in that order also granted a certificate for leave to appeal to the Federal Court. The petitioner then applied to the High Court praying the Court to direct that he be not transferred from the Lahore Central Jail

for a short period in order to enable him to consult his counsel for the filing of the appeal.

Held, that the Court having pronounced that the Court-martial proceedings were not illegal and having dismissed the case had no further concern with, or jurisdiction in, the matter. The petitioner's remedy, if any, was to make an application to the authority which under the Army Act could grant his request: ('15) 2 A. I. R. 1915 P. C. 29, *Rel. on*; 40 Cal. 955, *Ref.* [P 116 C 1, 2]

Cr. P. C. —

('41) Chitaley S. 561-A, N. 1.

('41) Mitra, Page 1800 N. "Scope."

K. L. Gauba and N. L. Bhalla—for Petitioner.

R. C. Soni for Advocate-General —

for the Crown.

[*Note.* — This case was referred by Blacker J. to the Full Bench consisting of Sir Arthur Trevor Harries, Chief Justice, Abdur Rahman, J. Kt., and Mehr Chand Mahajan J. who by their order dated 12th April 1944, expressed the view that the decision of the Full Bench reported in A. I. R. 1946 Lah. 103 would also govern this case. On return of the case the following order was passed by Blacker J.]

Order (*dated 24th April 1944*). — The petitioner in this case is one Albert West Meads, a convict in the Lahore Central Jail and formerly a temporary Major in the Royal Engineers, attached to a company of the Indian Engineers. He was tried by a General Field Court-martial at Lahore from 12th to 17th October 1943, and on conviction was sentenced to be cashiered and to undergo two years' imprisonment with hard labour. He has presented this petition through Mr. K. L. Gauba, Advocate of this Court, under S. 491, Criminal P. C., praying for a writ in the nature of habeas corpus for his release from imprisonment on the ground that it was illegal. In answer to a rule issued by me to the Punjab Government, the Superintendent of the Central Jail, and to the Adjutant-General in India, the learned Assistant to the Advocate-General appeared on behalf of the Punjab Government and stated that it was not concerned in the matter. On behalf of the Superintendent of Jail the warrant of commitment was produced, which was on the face of it in order. The petition was, therefore, contested by respondent 3, the Adjutant-General, through Mr. R. C. Soni, Barrister-at-Law. A number of objections to his convictions were raised on behalf of the petitioner, and they can be divided into three groups: (1) Objections to the jurisdiction of the Court-martial; (2) Want of the consent of the Governor-General under S. 270, Government of India Act, 1935, and (3) Objections to the conduct of the trial, that is to say, contentions that the procedure

was such as to deny him justice, and that there was no evidence on which a conviction could be based.

It will be convenient to take the second objection first. During the hearing of this petition it was brought to my notice that the question of the applicability to Courts-martial of S. 270, Government of India Act, was being raised in two cases: Criminal Misc. Petns. Nos. 68 of 1944 and 319 of 1943¹ which were pending before a Special Bench of three Judges of this Court and I referred this question of law to the same Bench. I did not merely await the decision of that Bench, as those cases related to the Indian Army Act. As this relates to the British Army Act, I thought it possible that this might be a ground for distinction. The Special Bench delivered its judgment on the 12th of this month, and held that no consent was necessary under S. 270, Government of India Act, to the institution of proceedings before a Court-martial under either Act. This finding, with which I respectfully agree, is of course binding on me, and I must dismiss this ground of objection.

It will be convenient to turn now to the third group of objections. With regard to the question of procedure I have seen the record of the Court-martial, and procedure adopted appears to me to be absolutely consistent with all principles of natural justice. Mr. Gauba for the petitioner did refer to what he called the wrong admission of the evidence of an expert. But the admission of that evidence, whether right or wrong, was clearly a matter within the jurisdiction of the Court-martial, and cannot possibly be made a ground for an order under S. 491. On the point whether there was evidence on which the conviction could be based, there was considerable argument before me regarding the powers of the High Court to inquire into this question. I have, however, been saved the labour of discussing these arguments in this judgment, as the matter has also been decided by the Special Bench, whose decision that this Court cannot enquire into the sufficiency of the evidence, so long as there is evidence is not only binding on me, but is one with which I most respectfully concur. I have moreover perused the evidence on which the convictions were based and I have found that not only was there evidence, but that it certainly could not be called insufficient. I can find no force, therefore, in the objections in the third group.

1. Reported in ('46) 33 A. I. R. 1946 Lah. 103.

I now come to the first group of objections which are indeed the real issues in this case. The first contention of Mr. Gauba for the petitioner—which was the contention upon which I issued the rule—was that the unit to which Major Meads belonged was not on active service within the meaning of S. 49, Army Act. Section 48, Army Act, is the general clause relating to Courts-martial, and the relevant provisions of it for the purposes of this case are that an officer can only be tried by a "General Court-martial," that a General Court-martial is only to be convened by His Majesty or an officer deriving authority immediately or mediately from His Majesty and that a General Court-martial is to consist of not less than five officers, each of whom must have held a commission for not less than three years. Section 49 is a special clause providing for "Field General Courts-martial" such as that now under consideration. Such a Court-martial may be composed of three officers, or in some cases only of two and no particular length of service is laid down as a qualification. On the other hand, it can only be convened, except in one special case which does not arise here, by an officer commanding a corps or portion of a corps on "active service," or by an officer in immediate command of a body of forces on "active service." Section 189 of the Act defines "active service," and the meaning given to the words when they are applied to a person subject to Military law, that he is attached to or forms part of a force which is engaged in operations against the enemy or is engaged in military operations in a country or place wholly or partly occupied by the enemy, or is in military occupation of any foreign country. Now it is clear that Major General Blaxland, who convened this Court-martial, commands a body of forces, namely, the troops composing the Lahore District, but what was not clear when I issued the rule, was that the troops in the Lahore District were on active service. Learned counsel for the respondent conceded that they would not have been on "active service" within the meaning of S. 189, Army Act, but drew my attention to Ordinance 10 [X] of 1941, by which every person in the army in India is deemed to be on active service for the purposes of the Army Act. Mr. Gauba was at first inclined to challenge the validity of this Ordinance, but on realising that it was made by virtue of powers given by an English Act of Parliament (Emergency Powers (Defence) Act of 1940) he conceded that it was

intra vires. He took, however, another line of argument, and that was that the Ordinance only applies to individuals and not to bodies of forces. It seems to me that this argument is completely untenable. If all the individuals composing a force are deemed to be on active service, it seems to me to follow as the night follows the day that the force itself must also be deemed to be on active service. It seems to me clear, then, that General Blaxland was on the material date (9th October 1943) the officer in immediate command of a body of forces on active service within the meaning of S. 49 and therefore empowered to convene a Field General Court-martial.

The next objection raised on behalf of the petitioner was one which under the ordinary criminal law would be described as relating to territorial jurisdiction. According to him, the offence was committed not in the Lahore district, but in the Military District of Rawalpindi, and, therefore, only the District Commander of Rawalpindi, or the Area Commander of Campbellpur, could convene a Field Court-martial to try it. Section 159, Army Act, however, appears to me to provide the complete answer to this objection. It lays down that the power to convene a Court-martial is given to the officer in whose jurisdiction the offender is at the time in the same manner as if the offence had been committed there. There is no doubt that at the time the Court-martial was convened and held, the petitioner was actually stationed at Lahore within the jurisdiction of General Blaxland. This objection, therefore, also falls to the ground. I now come to the last ground of attack. Under S. 49 of the Act the Field General Court-martial can only be convened when the officer convening it is of opinion that it is not *practicable* that an ordinary General Court-martial should be held. Army Form A-8 is a printed form for the assembly and proceedings of Field General Court-martial on active service, and includes a form of certificate in the following words:

"And whereas I am of opinion that it is not practicable that such officer should be tried by an ordinary General Court-martial."

In this case this form, including the certificate was duly signed by "A. B. Blaxland, Major-General, Commander, Lahore District." Mr. Gauba contended for the petitioner that this was a false certificate, and that General Blaxland did not in fact hold any opinion but merely blindly signed a printed form put before him. He concedes

the validity of the maxim "*Omnia præsuntur rite esse acta*" but argues that there are circumstances in this case to rebut that presumption of law. Passing over such general assertions as that printed forms are always signed "blind," the arguments that need be seriously considered are two. The first is that there are so many officers in Lahore that it was impossible that General Blaxland should really think that five could not be spared. The second is that the existence of a previous order dated 4th October 1943 and signed by the Lieutenant Colonel Ewen Cameron shows that the decision to hold the Court-martial had already been made by someone else, and that General Blaxland's signature to Form A-3 was merely an empty formality.

Neither of these arguments appears to me to have any real force. The first overlooks the very obvious fact that the operative word is not "possible," but "practicable." It would be idle for a civilian to attempt to substitute his opinion in such matters for that of an experienced and responsible military officer, but one consideration does seem to have been overlooked by Mr. Gauba, and that is that out of the many officers in Lahore, only a very small proportion would probably be qualified to sit on a General Court-martial, which requires three years' commissioned service. It is highly probable that most of the officers now in Lahore would have been commissioned since the beginning of the War, which started only a few days more than four years before the date of the order. It is also highly probable that all or nearly all the more senior officers would be engaged on duties from which it would not be practicable to withdraw them for as long as five days, without detriment to the public service. It is clear then that the number of officers in Lahore raises no presumption at all that General Blaxland's opinion was wrong far less that he could not have held such an opinion. The second point seems to have even less force. It is a matter of every day official experience that where the sanction of a superior officer is required, his subordinates will get everything ready in anticipation of his giving his sanction. This cannot possibly be interpreted as meaning that in such circumstances the superior authority will not apply his mind to the question whether sanction should be given. I can see no reason for assuming that if General Blaxland had thought that it was practicable to hold an ordinary Court-martial, he would nevertheless have signed

this form merely because his subordinate officers had already arranged for the holding of a Field Court-martial. The very notion appears to me to be ridiculous. There is, moreover, a further aspect of the question. In my view R. 123 of the Rules of Procedure made under S. 70, Army Act, precludes this Court from even inquiring whether General Blaxland held such an opinion or not. Rule 123 runs as follows :

"Any statement in an order convening a field general Court-martial as to the opinion of the convening officer, and any statement in the minute confirming the finding or sentence of a field general Court-martial as to the opinion of the confirming officer, shall be conclusive evidence of that opinion, but this rule shall not prejudice the proof at any time of any such opinion when not so stated."

Mr. Gauba did, indeed, argue that this rule, was only binding on the Court-martial itself. The language of the rule, however, rebuts this view, as the statement in the minute confirming the finding of the Court-martial must be made after the Court-martial is *functus officio*. Moreover, the rule is a statutory rule made under the provisions of S. 70 of the Act, which section shows that the rule must have been laid before Parliament, and directs that the rules "shall be judicially noticed." It seems to me clear that the rule has the force of law and is binding on all Courts. In conclusion then I am of opinion that not one of the objections to the legality of the proceedings can stand, and I find that the custody in which the petitioner is now detained is clearly lawful. I accordingly dismiss this petition and discharge the rule issued by me. I also grant a certificate for leave to appeal to the Federal Court, as the decision of this case involves a substantial question as to the interpretation of Section 270, Government of India Act.

Judgment (*dated 3rd May 1944*). — On 24th April 1944, I dismissed a petition by the present petitioner under S. 491, Criminal P. C., and, in that order, I also granted a certificate for leave to appeal to the Federal Court. The present petition before me is by the same petitioner praying me to direct that he be not transferred from Lahore Central Jail for a short period in order to enable him to consult his counsel for the filing of an appeal. This petition has been opposed on behalf of the military authorities through Mr. R. C. Soni. After considering the terms of S. 561-A, Criminal P. C., and the authorities cited before me I am of the opinion that I have no power in law to make the order prayed for. There is no doubt that the

terms of S. 561-A are wide but at the same time I think it must be clearly understood as has been frequently laid down, that they do not extend the jurisdiction of High Court to matters which are not already inherently within that jurisdiction. The subject-matter of the case by virtue of which the petitioner is imprisoned which was tried by a Court-martial, was not a matter within the jurisdiction of this Court at all. It only came temporarily within the jurisdiction of this Court by reason of the Court's extraordinary powers to interfere under S. 491, Criminal P. C., if the legality of the proceedings was questioned. It seems to me that the Court having pronounced that these Court-martial proceedings were not illegal and having dismissed the case had no further concern with, or jurisdiction in the matter.

It has been stated before me by the petitioner that the order sought is necessary for the ends of justice because he says that his means would not allow him to avail himself of the certificate if he had to leave Lahore and go to a distant place. It seems to me, however, that his is not a valid contention. He could still file an appeal; but all that it means is that he could not do it so effectively. This would at the most be an argument for persuading me to make this order if I had jurisdiction to make it; but it seems to me for the reasons I have given that I have not got this jurisdiction. I would in this connection refer to a dictum in 40 Cal. 955,² which dealt with the power of the High Court to grant a stay of execution in a civil case pending an application for leave to appeal to the Privy Council. The learned Judges there said: "The decree was made by this Court and the Court has control over it." That remark would illustrate the distinction between that case and this. The order of the Court-martial in this case was not made by this Court or by any Court subordinate to it and this Court has no control over it except within the limited jurisdiction conferred upon it by S. 491. I would also refer to 42 Cal. 739³ in which the Privy Council itself refused to direct the stay of the execution of a sentence of death pending the hearing of an application for leave to appeal, even though the execution of that sentence would make the application to itself infructuous. Their Lordships held that the

stay of the execution of the sentence was entirely a matter for the executive authorities to decide. It seems to me that in this case the petitioner's remedy if any is the same. He may be able to make an application to the authority which under the Army Act can grant his request; but this Court, in my opinion, cannot interfere, being *functus officio*. I therefore dismiss this petition.

V.R./D.H.

Petition dismissed.

[Case No. 29.]

** A. I. R. (33) 1946 Lahore 116

FULL BENCH

HARRIES C. J., ABDUL RASHID, RAM LALL, BECKETT AND MAHAJAN JJ.

Firm Karam Narain Daulat Ram and another — Plaintiffs — Appellants
v.*Messrs Volkart Bros. and another*
— Defendants — Respondents.

First Appeal No. 315 of 1942, Decided on 7th May 1945; reference made by Abdul Rashid and Ram Lall JJ., D/- 27th April 1945.

** (a) Sale of Goods Act (1930), S. 54 (4) — Contract containing arbitration clause rescinded on seller exercising right of resale — Arbitration clause is not wiped out and reference to arbitration can be made. (Per *Full Bench*) : I.L.R. (1942) Lah. 788 : ('41) 28 A. I. R. 1941 Lah. 427 : 198 I.C. 17 and 45 P. L. R. 287 : ('43) 30 A. I. R. 1943 Lah. 295 : 212 I. C. 411, OVERRULED.

Where a contract of sale of goods contains an arbitration clause, and the seller expressly reserves a right of re-sale in case the buyer should make default, the arbitration clause is not wiped out on the rescission of the contract by the seller by the exercise of his right of re-sale under the contract and hence reference to arbitration can be made in pursuance of the arbitration clause : I.L.R. (1942) Lah. 788 : ('41) 28 A. I. R. 1941 Lah. 427 : 198 I. C. 17 and 45 P. L. R. 287 : ('43) 30 A.I.R. 1943 Lah. 295 : 212 I.C. 411, OVERRULED; (1942) 1 All E. R. 337, *Rel. on*; (1926) A. C. 497, *Explained*; *Case law discussed.* [P 120 C 1; P 126 C 2]

(b) Sale of Goods Act (1930), S. 54 (4)—Rescission does not completely annul contract — Contract is still kept alive for providing means for claiming damages.

The term "rescission" as used in S. 54 (4) does not mean complete and total annulment of the contract and by such rescission the parties are not placed in the same position as if they had never entered into contract. As sub-s. (4) reserves to the seller the right to claim damages in spite of rescission the contract must be regarded as existing at least for the purpose of claiming such damages. Consequently it must be regarded as existing for providing the means for claiming such damages.

(Distinction between frustration and rescission pointed.) [P 120 C 2; P 121 C 1]

(c) Sale of Goods Act (1930), Ss. 54 (4) and 60 — Rescission of contracts under, distinction between. (Per *Harries C. J.*)

2. ('13) 40 Cal. 955 : 18 I. C. 207, *Nandkishore Singh v. Ram Golam Sahu*.

3. ('15) 2 A.I.R. 1915 P. C. 29 : 42 Cal. 739 : 42 I. A. 133 : 29 I. C. 334 (P. C.), *Balmukund v. Emperor*.

There is no real distinction between rescission of contract under S. 60 and that under S. 54 (4). Under S. 60, one party may accept the other's repudiation and thereby relieve himself from all further obligations under the contract. In other words, he can regard the contract as rescinded and he, by his option, rescinds the contract. Under S. 54, sub-s. (4), the seller is not bound to re-sell when power is given to him to re-sell in the contract. But if he elects to re-sell, he thereby rescinds the contract or treats it as rescinded. The rescission is as much at the option of the party not in default under S. 54, sub-s. (4), as it is under S. 60. In both the cases it is by the act of the party not in default that the contract is rescinded. Once the party who is not in default has elected to pursue a certain course, he puts an end to the contract and it is rescinded. Both are cases of rescission without prejudice to a right to claim damages. In other words, both are cases of rescission absolving the parties from all future obligations, but in each case the contract is kept alive for the purposes of assessing damages for breach. [P 123 C 1, 2]

(d) Interpretation of statutes — Expressions used in Statute — Their definitions given in Lexicon how far acceptable. (Per *Ram Lall J.*)

Lexicons would only define an expression in terms of a decision given by a Court of law and unless this decision was one given under the Act in which the expression is used it involves a dangerous method of interpretation. [P 128 C 2]

(e) Contract—Arbitration clause—Scope and nature of, explained — Arbitration clause is severable and distinct from other clauses of contract. (Per *Ram Lall and Mahajan JJ.*)

The arbitration clause in a contract can be regarded as a thing apart from the main conditions of a contract and it is not a necessary clause in the contract. The main contract deals with the performance of mutual obligations and how they are to be performed, whereas the arbitration clause deals only with the procedure for determining liabilities created by the contract, and the arbitration clause itself creates no liability. It embodies the agreement of both parties that, if any dispute arises with regard to the obligation which the one party has undertaken to the other, such a dispute shall be settled by a tribunal of their own constitution. Moreover, there is this very material difference that, whereas in an ordinary contract the obligations of the parties to each other cannot in general be specifically enforced and breach of them results only in damages, the arbitration clause can be specifically enforced by the machinery of the Arbitration Acts. The appropriate remedy for breach of the agreement to arbitrate is not damages but its enforcement : (1942) 1 All E. R. 337, *Rel. on.* [P 130 C 2; P 131 C 1]

Yashpal Gandhi and Daya Krishen Mahajan — for Appellants.

M. L. Puri and Data Ram Kapur; and A. N. Grover — for Respondents (1 and 2 respectively.)

ORDER OF REFERENCE.

Abdul Rashid J.—This appeal has arisen out of an action brought by the joint Hindu family, Karam Narain-Daulat Ram, against Messrs. Volkart Brothers of Karachi to set aside an award dated 21st November 1939, obtained by the defendants for a sum of Rs. 7789-5-0 with interest and costs. The

allegations of the plaintiffs are that they placed a number of orders for the supply of blankets with the defendants, that the defendants gave delivery of 8 bales of blankets in one contract and one bale of blankets in another contract and that disputes arose between the parties regarding the remainder. Ultimately the defendant company re-sold the goods which had not been taken delivery of by the plaintiffs in exercise of their rights under cl. 5 of the contract. The re-sale by the defendants resulted in the rescission of all the contracts and the arbitration clause disappeared with the rescission of the contracts. The defendants were, therefore, not entitled to refer the disputes relating to these contracts to arbitration. The award of the arbitrators was consequently wholly void and was liable to be set aside at the instance of the plaintiffs. The defendants pleaded, *inter alia*, that the plaintiffs appeared before the arbitrators and in the proceedings before the Karachi Court, that it was open to them to urge that as a result of the re-sale the original contracts had been rescinded, that the arbitration clause had been wiped out as a result of the rescission and that the arbitrators had, therefore, no jurisdiction to proceed with the arbitration, and that the Court had no jurisdiction to file the award. The fact that this objection was not raised by the plaintiffs before the arbitrators and the Karachi Court barred the present suit by the application of the principles of *res judicata*. The trial Court dismissed the suit on the ground that it was barred by *res judicata*. Against this decision the plaintiffs have preferred an appeal to this Court.

Mr. Gandhi contended strenuously that it had been laid down by a Division Bench of this Court consisting of Tek Chand and Beckett JJ. in A. I. R. 1941 Lah. 427¹ that the arbitration clause being an integral part of the contract must be held to have been wiped out on the rescission of the contract by the seller by the exercise of his right of re-sale and hence no reference to arbitration could be made in pursuance of the arbitration clause. The learned counsel urged that since the re-sale had taken place the entire contract of sale of goods including the arbitration clause had disappeared by virtue of the provisions of sub-s. (4) of S. 54, Sale of Goods Act, and that the only remedy of the sellers was to institute a suit for damages. As the arbitration clause was

1. ('41) 28 A. I. R. 1941 Lah. 427 : I.L.R. (1942) 23 Lah. 788 : 198 I. C. 17, Chandu Lal Parmanand v. Grahams Trading Co. (India) Ltd.

wiped out by the rescission of the contract, the arbitrators had no jurisdiction to make any pronouncement on the dispute between the parties. The proceedings before the arbitrators were, therefore, wholly without jurisdiction. If the proceedings before the arbitrators were without jurisdiction, the learned counsel contended, the proceedings before the Court for the filing of the award were equally without jurisdiction. In this connection, the learned counsel relied on a Privy Council decision reported in 50 Cal. 1² where the following observations occur:

"On the argument before their Lordships, it was argued, as a preliminary point, that the suit would not lie, as the only remedy open to the plaintiffs was to move to set aside the awards under S. 14, Arbitration Act, and this could not be done after the awards had been enforced by execution. In their Lordships' opinion, there is no substance in this point. Any objection to an award on the ground of misconduct or irregularity on the part of the arbitrator ought, no doubt, to be taken by motion to set aside the award; but where (as here) it is alleged that an arbitrator *has acted wholly without jurisdiction*, his award can be questioned in a suit brought for that purpose. Nor is the fact that the award has been enforced by execution under S. 15 a bar to a suit to have it declared void and for consequential relief. Section 15 does not enact that the award, when filed, is to be deemed to be a decree of the Court, but only that it is to be enforceable as if it were a decree."

In addition to A. I. R. 1941 Lah. 427,¹ Mr. Gandhi relied on 45 P. L. R. 287³ and 1926 A. C. 497.⁴ In 45 P. L. R. 287³ Abdur Rahman J. followed the decision of Tek Chand and Beckett JJ. in A. I. R. 1941 Lah. 427.¹ It was contended before the learned Judge that the soundness of the Division Bench ruling and of the Privy Council case in 1926 A. C. 497⁴ had been considerably shaken by a decision of the House of Lords in (1942) 1 ALL E. R. 337.⁵ The learned Judge held that the decisions of their Lordships of the Privy Council and of Division Benches of this Court were binding on him and had to be followed in preference to the decisions of the House of Lords to the contrary. It appears to me, therefore, that the basis of the decisions of the Division Bench and of Abdur Rahman J. is the decision of the Privy Council reported in 1926 A. C. 497.⁴ I am, however, of the opinion that the decision of

the Privy Council is clearly distinguishable from the present case. The facts of the Privy Council case were that by a charter party made in November 1916, the respondents agreed to place their steamship at the disposal of the appellants at Singapore on 1st March 1917, and the appellants agreed to employ her on specified terms for ten months from the date when she was delivered to them. The charter party contained a clause by which all disputes arising out of the contract were to be submitted to arbitration in Hong Kong. The ship was requisitioned by the Government before 1st March 1917, and was not released until February 1919. The appellants then refused to take delivery of her. An arbitrator awarded the respondents damages for breach of contract, and they brought an action upon the award. In these circumstances, it was held that there had been in 1917 a frustration of the charter party which forthwith brought to an end the whole contract, including the submission to arbitration, and that consequently the contract being executory the arbitrator had no jurisdiction. The legal effect of the frustration of a contract does not depend upon the intention of the parties, or their opinions or even knowledge, as to the event which has brought about the frustration, but upon its occurrence in such circumstances as to show it to be inconsistent with the further prosecution of the adventure. The case before their Lordships was not of the rescission of a contract. At p. 509 their Lordships made a number of observations drawing a distinction between the frustration of a contract and the rescission of a contract. Their observations may be reproduced *in extenso* :

"Language is occasionally used in the cases which seems to show that frustration is assimilated in the speaker's mind to repudiation or rescission of contracts. The analogy is a false one. Rescission (except by mutual consent or by a competent Court) is the right of one party, arising upon conduct by the other, by which he intimates his intention to abide by the contract no longer. It is a right to treat the contract as at an end if he chooses, and to claim damages for its total breach, but it is a right in his option and does not depend in theory on any implied term providing for its exercise, but is given by the law in vindication of a breach. Frustration, on the other hand is explained in theory as a condition or term of the contract, implied by the law *ab initio*, in order to supply what the parties would have inserted had the matter occurred to them, on the basis of what is fair and reasonable, having regard to the mutual interests concerned and of the main objects of the contract. It is irrespective of the individuals concerned, their temperaments and failings, their interests and circumstances. It is really a device, by which the rules as to absolute contracts are reconciled with a special exception which justice demands.

2. (22) 9 A. I. R. 1922 P. C. 374 : 50 Cal. 1 : 49 I. A. 366 : 70 I. C. 777 (P. C.), E. D. Sassoon & Co. v. Ram Dutt Ram Kisen Das.

3. (43) 30 A. I. R. 1943 Lah. 295 : 212 I. C. 411 : 45 P. L. R. 287, Radha Kishan v. Bombay Co. Ltd.

4. (1926) 1926 A. C. 497 : 95 L. J. P. C. 121 : 134 L. T. 737, Hirji Mulji v. Cheong Yue Steamship Co. Ltd.

5. (1942) 1942 A. C. 356 : 111 L. J. K. B. 241 : 166 L. T. 306 : (1942) 1 All E. R. 337, Heyman v. Darwins Ltd.

There is, however, this point of contact between the two cases. Though a party may exercise his right to treat the contract as at an end, as regards obligations *de futuro*, it remains alive for the purpose of vindicating rights already acquired under it on either side. So with frustration. Though the contract comes to an end on the happening of the event, rights and wrongs, which have already come into existence, remain, and the contract remains too, for the purpose of giving effect to them."

In my opinion, therefore, frustration stands on an absolutely different footing from the rescission of a contract and no assistance can be derived from the observations of their Lordships of the Privy Council in 1926 A. C. 497⁴ in arriving at the conclusion that the rescission of a contract wipes out the arbitration clause altogether, Mr. Grover on behalf of the respondents relied on I.L.R. (1941) 2 Cal. 534,⁶ 53 Bom. 573⁷ and (1942) 1 ALL L. R. 337.⁵ The learned counsel contended that the purchase and sale of goods constitute one contract. The arbitration clause constitutes a second contract. Both of these contracts may be embodied in the same document but they are in the eye of law two distinct contracts. If the seller exercises his right of re-sale, the contract relating to the sale of goods is rescinded but the rescission of this contract does not lead to the rescission of the second contract which is that any disputes arising between the parties will be referred to arbitration. The rulings relied upon by the learned counsel seem, to a certain extent, to support the contention put forward by him. The point is not free from difficulty and is one of immense importance to the mercantile community. In these circumstances I would refer the following question to a Full Bench for disposal :

"Where a contract of sale of goods contains an arbitration clause, and the seller expressly reserves a right of re-sale in case the buyer should make default, is the arbitration clause wiped out on the rescission of the contract by the seller by the exercise of his right of re-sale under the contract and hence no reference to arbitration can be made in pursuance of the arbitration clause?"

After the Full Bench has decided the question referred to above the case will be placed before a Division Bench for final disposal.

Note.—The original contracts were placed on the record by Messrs. Volkart Brothers in the trial Court. After the trial Court had decided the case the original contracts were taken away by the learned counsel for the

defendants. Mr. Grover has been directed to place one of these contracts on the record or to bring it with him on the day when this reference is heard by the Full Bench.

Ram Lall J.—I agree that the point involved is one of great importance that the decision of the Division Bench of this Court reported in A. I. R. 1941 Lah. 427¹ requires further examination and that, therefore, this is a fit case to be decided by a larger Bench.

Judgment by the Full Bench.

Harries C. J. — This is a reference made by a Bench hearing Regular First Appeal No. 315 of 1942. The defendants in the suit giving rise to the appeal had sold certain goods to the plaintiffs by means of a number of written contracts. In each of the contracts there is a term giving the sellers a power to re-sell in the event of the buyers' failing to pay for the goods within a certain time. The clause in all the contracts giving this power is in the following terms:

"Should the undersigned jointly and/or severally fail to pay for the goods within two months after arrival, Messrs. Volkart Bros. may at any time and at any place thereafter sell the goods on our account and risk, either by auction or by private bargain and we agree to make good to them any loss and expense incurred thereby, and also to pay them in addition 2 per cent. for re-sale commission and 3/4 per cent. for re-sale brokerage."

Each of the written contracts also contained an arbitration clause which was in these terms:

"Disputes of whatever nature arising out of this contract to be referred to the Survey or Arbitration of two European merchants in Karachi one to be chosen by each party, whose decision we agree to accept as binding and final, but should the two Surveyors or Arbitrators (as the case may be) be unable to agree, they shall refer the case to an umpire, whose decision shall be final and binding upon both parties."

It will be seen that the arbitration clause is framed in the widest possible terms and covers disputes of whatever nature arising out of the contracts. It appears that the plaintiffs accepted part of the goods tendered under these contracts and then disputes arose between the parties. The defendants alleged that the plaintiffs had failed to pay for the goods as required by the contracts and accordingly they re-sold the goods under the powers contained in the contracts and thereby suffered loss. The disputes were referred to two arbitrators under the arbitration clauses and these arbitrators eventually awarded the defendants in this suit a sum of Rs. 7789-5-0 as damages. The plaintiffs thereupon brought the suit,

6. ('42) 29 A. I. R. 1942 Cal. 83 : I. L. R. (1941) 2 Cal. 534 : 199 I. C. 418, Krishna K. Mukherjee v. Haripada Bhattacharjee.

7. ('29) 16 A. I. R. 1929 Bom. 242 : 53 Bom. 573 : 121 I. C. 437, India Electric Co. Ltd. v. General Electric Trading Co.

which gave rise to this appeal, claiming the following reliefs: (1) A declaration that the award made by the arbitrators in favour of the defendants should be declared to be without jurisdiction and null and void. (2) An injunction restraining the defendants from executing the said award which had been filed.

The trial Court dismissed the suit and the plaintiffs appealed to this Court. Before a Bench of this Court, it was contended on behalf of the plaintiffs that the contracts of sale were rescinded when the defendants re-sold the goods. This, it was said, was due to the provisions of S. 54, sub-s. (4), Sale of Goods Act. It was urged that as the contracts were rescinded, they must be regarded as having been completely wiped out. The parties were, therefore, restored to the same position as if contracts had never been made between them, except that the defendants had right to recover damages. As the contracts no longer existed, as they had been wiped out, it was urged that the arbitration clauses had also ceased to exist. The arbitrators, therefore, had no jurisdiction as there were no longer in existence agreements to refer disputes to arbitration. Hence, it was claimed that the award was null and void and should not be executed. For these contentions the plaintiffs relied on a recent Bench decision of this Court, 23 Lah. 788,¹ which it was said, concluded the matter in their favour. This authority purported to follow a decision of their Lordships of the Privy Council, 1926 A. C. 497.⁴ The plaintiffs also relied on a decision of a Single Judge of this Court in 45 P. L. R. 287,³ in which the learned Single Judge followed the Bench decision to which I have referred as he was bound to do. The learned Judges constituting the Bench hearing the appeal doubted the correctness of the decision in 23 Lah. 788.¹ The learned Judges were inclined to the view that the scope of 1926 A. C. 497⁴ had not been properly appreciated in 23 Lah. 788.¹ They accordingly referred the following question for decision by a Full Bench:

"Where a contract of sale of goods contains an arbitration clause, and the seller expressly reserves a right of re-sale in case the buyer should make default, is the arbitration clause wiped out on the rescission of the contract by the seller by the exercise of his right of re-sale under the contract and hence no reference to arbitration can be made in pursuance of the arbitration clause."

The point raised is one of the greatest importance and is constantly occurring in cases in this Province. The matter was,

therefore, referred to this Bench of five Judges for decision. The question referred concerns the true construction to be given to the word "rescinded" in S. 54, sub-s. (4), Sale of Goods Act. That sub-section is in these terms:

"Where the seller expressly reserves a right of re-sale in case the buyer should make default, and on the buyer making default re-sells the goods, the original contract of sale is thereby rescinded, but without prejudice to any claim which the seller may have for damages."

It is to be observed that though the contract is rescinded, the seller's claim to damages is kept alive. In 23 Lah. 788,¹ the facts of which were similar to the present case, a Bench decided that rescission in S. 54, sub-s. (4), Sale of Goods Act, means complete and total annulment of the contract. At p. 794, Tek Chand J. observed:

"The first point to be considered is the meaning and effect of the provision that, in the circumstances mentioned, the contract is rescinded except for one particular matter specified therein. The rescission of a contract means its 'annulment', 'complete destruction' (Wharton's Law Lexicon, 15th edition, page 872). In Black on Rescission and Cancellation (Edn. 2), page 1, it is stated that 'to rescind a contract is not merely to terminate it, but to abrogate and undo it from the beginning; that is, not merely to release the parties from further obligation to each other in respect to the subject of the contract but to annul the contract and restore the parties to the relative positions which they would have occupied if no such contract had ever been made.'

The effect of rescission under sub-s. (4) of S. 54 would, therefore, be to completely annul the contract, and had it not been for the last part, which saves a claim which the seller may have for damages, the position of the parties would have been as if the contract had never existed."

It is difficult to give the word "rescission" the meaning suggested by Tek Chand J. when the right is given to the seller to claim damages in respect of the breach. To assess such damages reference must be made to the contract. But how can such a reference be made if rescission in this sub-section means not merely to release the parties from further obligations in respect of the subject of the contract, but to annul the contract and restore the parties to the positions which they would have occupied if no such contract had ever been made? If the contract must be deemed never to have existed, then no claim for damages could ever be preferred. The sub-section, however, reserves to the seller his right to claim damages in spite of rescission and the effect of that must mean that the term "rescission" as used in this sub-section does not mean complete and total annulment of the contract and by such rescission the parties are

not placed in the same position as if they had never entered into a contract. At page 795, Tek Chand J. undoubtedly realized this when he stated that

"had it not been for the last part, which saves a claim which the seller may have for damages, the position of the parties would have been as if the contract had never existed."

It appears to me that the rescission contemplated in S. 54 (4) is something less than a complete annulment or destruction of the contract. As a claim for damages by the seller is saved, the contract must be regarded as existing at least for that purpose; otherwise such claim could never be enforced. If the contract must be regarded as still existing for the purposes of claiming damages, why should it not be regarded as existing for providing the means for claiming such damages? The view of Tek Chand J. in 23 Lah. 788¹ was that such a claim for damages could only be brought in the civil Courts as the arbitration clause had been annulled and wiped out by the rescission of the contract. The word "rescind" also occurs in S. 60, Sale of Goods Act, which is in these terms :

"Where either party to a contract of sale repudiates the contract before the date of delivery, the other may either treat the contract as subsisting and wait till the date of delivery, or he may treat the contract as rescinded and sue for damages for the breach."

It will be seen that this section provides that when one party before the date of delivery repudiates the contract, the other party can either wait until the date of delivery and then bring proceedings, or he may there and then treat the contract as rescinded and sue for damages. If he treats the contract as rescinded, his rights thereafter will be governed as though actual rescission of the contract had taken place, though he can sue for damages. This section is, to all intents and purposes, a re-statement of the English law relating to anticipatory breaches of contracts of sale. It had been frequently contended in England that in cases of anticipatory breaches of contract, acceptance by the other party of a repudiation of the contract effected rescission and completely annulled or wiped out the contract. Where such contracts contained arbitration clauses, it was contended that, as by the party's conduct in accepting repudiation, the contract was rescinded or annulled, such party could not rely on any arbitration clause contained in such contract and claim a right to have the dispute decided by arbitrators. These contentions which had been made in England were similar to those

which found favour in the decision in 23 Lah. 788.¹ The matter, however, has been set at rest in England by a recent decision of the House of Lords in (1942) 1 ALL E. R. 337.⁵ In that case the respondents contracted with the appellants, an American firm, whereby the latter were to act as their selling agents over a wide area. The agreement contained an arbitration clause in these terms :

"If any dispute shall arise between the parties hereto in respect of this agreement or any of the provisions herein contained or anything arising hereout, the same shall be referred for arbitration."

A dispute arose between the parties, and the appellants, having intimated to the respondents that their letters showed that they had repudiated the agreement, issued a writ against them, claiming a declaration that the respondents had repudiated the agreement and damages under a number of heads. The respondents claimed that the action should be stayed pursuant to the Arbitration Act, 1889, S. 4, in order that the matters in dispute might be referred under the arbitration clause. The appellants contended that, the respondents having repudiated the agreement as a whole and the appellants, by the issue of the writ, having accepted that repudiation, the contract had ceased to exist for all purposes, and the respondents could not afterwards rely on the arbitration clause. The House of Lords unanimously held that "the dispute between the parties was a dispute within the arbitration clause and the appellants' action ought to be stayed. Where there has been a total breach of a contract by one party so as to relieve the other of his obligations under it, an arbitration clause, if its terms are wide enough, still remains effective. This is so even where the injured party has accepted the repudiation, and, in such circumstances, either party may rely on the clause."

The case giving rise to the House of Lords decision was a case of anticipatory breach, namely, where one party before the contract had been fully performed, had repudiated his obligation and the other party had accepted the repudiation. In such a case in England the person accepting the repudiation could treat the contract as rescinded and sue for damages. Such is the position envisaged in S. 60, Indian Sale of Goods Act, in the case of contracts of sale. Dealing with the question as to what "rescission" means in cases of anticipatory breaches of contract, i. e., cases similar to those falling within S. 60, Indian Sale of Goods Act, Lord Simon L. C., at pp. 340, 341, observed as follows :

"If one party so acts or so expresses himself, as to show that he does not mean to accept and discharge the obligations of a contract any further,

the other party has an option as to the attitude he may take up. He may, notwithstanding the so-called repudiation, insist on holding his co-contractor to the bargain and continue to tender due performance on his part. In that event, the co-contractor has the opportunity of withdrawing from his false position, and, even if he does not, may escape ultimate liability because of some supervening event not due to his own fault which excuses or puts an end to further performance. (A classic example of this is to be found in *Avery v. Bowden*.⁸) Alternatively, the other party may rescind the contract, or (as it is sometimes expressed) 'accept the repudiation,' by so acting as to make plain that, in view of the wrongful action of the party who has repudiated, he claims to treat the contract as at an end, in which case he can sue at once for damages."

Dealing with the same matter, Lord Macmillan, at pp. 346, 347, observed :

"Repudiation, then in the sense of a refusal by one of the parties to a contract to perform his obligations thereunder, does not of itself abrogate the contract. The contract is not rescinded. It obviously cannot be rescinded by the action of one of the parties alone. Even if the so called repudiation is acquiesced in or accepted by the other party, that does not end the contract. The wronged party has still his right of action for damages under the contract which has been broken, and the contract provides the measure of those damages. It is inaccurate to speak in such cases of repudiation of the contract. The contract stands, but one of the parties has declined to fulfil his part of it. There has been what is called a total breach, or a breach going to the root of the contract, and this relieves the other party of any further obligation to perform what he for his part has undertaken. Now, in this state of matters, why should it be said that the arbitration clause, if the contract contains one, is no longer operative or effective? A partial breach leaves the arbitration clause effective : why should a total breach abrogate it? The repudiation, not being of the contract, but of obligations undertaken by one of the parties, why should it imply a repudiation of the arbitration clause so that it can no longer be invoked for the settlement of disputes arising in consequence of the repudiation? I do not think that this is the result of what is termed repudiation. Suppose the injured party prefers to have his claim of damages for the other party's total breach assessed by arbitration, can he not invoke and enforce the arbitration clause for that purpose? Can he be effectually met by a plea on the part of the wrongdoer that he, the wrongdoer, has repudiated the contract and with it the arbitration clause, which is consequently no longer operative? I do not think that this result follows even if the injured party acquiesces in the total breach—accepts the repudiation, as it is put—and contents himself with his claim of damages. I think he is entitled to insist on having his damages assessed by arbitration notwithstanding the other party's repudiation."

At page 350 Lord Wright observed :

"Another case to which the word repudiation is applied is when the party, though not disputing the contract, declares unequivocally that he will not perform it, and, admitting the breach, leaves the other party to claim damages. There may then be a dispute under the contract, not indeed

as to liability, but as to damages. Such a dispute would normally fall within the ordinary submission, which should receive effect unless the Court exercises its discretion to refuse a stay under S. 4. Except as influencing the exercise of that discretion, I cannot see how defiance or truculence of the party can affect the matter. He is simply breaking his contract. Perhaps the commonest application of the word 'repudiation' is to what is often called the anticipatory breach of a contract, where the party by words or conduct evinces an intention no longer to be bound, and the other party accepts the repudiation and rescinds the contract. In such a case, if the repudiation is wrongful and the rescission is rightful, the contract is ended by the rescission; but only as far as concerns future performance. It remains alive for the awarding of damages, either for previous breaches, or for the breach which constitutes the repudiation. That is only a particular form of contract breaking and would generally under an ordinary arbitration clause, involve a dispute under the contract like any other breach of contract. There is no difference, for instance, for this purpose between a refusal to take further instalments under a contract for the sale of goods by instalments and a refusal to take the entire contract quantity where the tender is to be a single delivery. I need scarcely add that one party to a contract cannot put an end to it. To produce that effect there must be rescission. An anticipatory breach does not necessarily involve an actual intention to break the contract. Intention is to be judged by the party's conduct. The difference between repudiating a contract and repudiating liability under it must not be overlooked."

At page 360 Lord Porter observed :

"What, then, is the effect of such repudiation if it be accepted? In such a case the injured party may sue upon the contract forthwith whether the time for performance is due or not, or, if he has wholly or partially performed his obligation, he may in certain cases neglect the contract and sue upon a *quantum meruit*. In the former case he is still acting under the contract. He requires to refer to its terms at least in order to ascertain the damage, and may require to refer to them also if the repudiation of the contract is in issue.

* * * * *

There remains the question what result follows where the original existence and efficacy of the contract is not in dispute, but one party has, or it is claimed that he has, refused to be bound by its terms and has disregarded it *in toto* and the other party has accepted his repudiation. In such a case the question of damage has still to be determined, and the question whether there has been repudiation may be still in issue. Are these disputes under the contract? I use the word 'under' advisedly since expressions such as 'arising out of' or 'concerning' have a wider meaning. I think they are. The contract must be adverted to in order to arrive at their solution. To say that the contract is rescinded or has come to an end or has ceased to exist may in individual cases convey the truth with sufficient accuracy but the fuller expression that the injured party is hereby absolved from future performance of his obligations under the contract is a more exact description of the position. Strictly speaking, to say that, upon acceptance of the renunciation of a contract, the contract is rescinded is incorrect. In such a case the injured party may accept the renunciation as a breach

⁸. (1856) 6 E. & B. 953 : 26 L. J. Q. B. 3 : 23 L. T. (O. S.) 145 : 5 W. R. 45.

going to the root of the whole of the consideration. By that acceptance he is discharged from further performance and may bring an action for damages, but the contract itself is not rescinded."

In my view, it is clear that where a seller under S. 60, Sale of Goods Act, accepts a buyer's repudiation before delivery, or complete delivery, the contract is rescinded, but the rescission is without prejudice to his right to recover damages. By his acceptance of the buyer's refusal he has elected to treat the contract as rescinded or to rescind it. But according to the House of Lords the contract is not completely wiped out. The parties are absolved from all further obligations under the contract, but the contract exists for the purposes of a claim for damages for its breach. The rescission in S. 60 appears to me to be the same as the rescission contemplated in S. 54, sub-s. (4), Sale of Goods Act. Both are cases of rescission without prejudice to a right to claim damages. In other words, both are cases of rescission absolving the parties from all future obligations, but in each case the contract is kept alive for the purposes of assessing damages for breach. It was urged by the respondents in this case that the House of Lords decision in (1942) 1 ALL E. R. 337⁵ disposes of the matter in their favour. But it was strongly urged by the plaintiff-appellants that this House of Lords decision cannot be relied upon in this Court because (1) it is a decision as to the effect of rescission in cases of anticipatory breach such as cases under S. 60, Indian Sale of Goods Act, whereas the present case concerns rescission under S. 54, sub-s. (4), Indian Sale of Goods Act; (2) the decision in (1942) 1 ALL E. R. 337⁵ is in conflict with the decision of their Lordships of the Privy Council in 1926 A. C. 497.⁴ A decision of their Lordships of the Privy Council, it is urged, is binding on this Court, whereas a decision of the House of Lords is not. 1926 A. C. 497⁴ must be followed and as the case in 23 Lah. 788¹ follows 1926 A. C. 497⁴ it must be followed in the present case.

I shall deal firstly with the contention that the rescission contemplated in S. 54, sub-s. (4), Sale of Goods Act, is something different from that contemplated in S. 60 of that Act. It was urged that in S. 60, Sale of Goods Act, the rescission occurs as a result of the act of one of the parties in accepting the repudiation of the other and suing for damages, whereas rescission occurs in cases falling within S. 54, sub-s. (4), by operation of law. In my judgment, however, there is no real distinction between

the two cases. Under S. 60, one party may accept the other's repudiation and thereby relieve himself from all further obligations under the contract. In other words, he can regard the contract as rescinded and I think it can be said that he, by his option, rescinds the contract. Under S. 54, sub-s. (4), the seller is not bound to re-sell when power is given to him to re-sell in the contract. But if he elects to re-sell, he thereby rescinds the contract or treats it as rescinded. The rescission is as much at the option of the party not in default under S. 54, sub-s. (4), as it is under S. 60. In both the cases it is by the act of the party not in default that the contract is rescinded. Once the party who is not in default has elected to pursue a certain course, he puts an end to the contract and it is rescinded. It appears to me, therefore, that the House of Lords case in (1942) 1 ALL E. R. 337⁵ is as applicable to cases under S. 54, sub-s. (4), Sale of Goods Act, as it is to cases of anticipatory breach, i.e., the cases falling within S. 60, Sale of Goods Act.

The second point taken by the appellants was that the House of Lords case is in conflict with 1926 A. C. 497⁴ and as the latter is a decision of their Lordships of the Privy Council, this Court must follow the latter case. It is true that the House of Lords doubted the correctness of many of the observations contained in the judgment in 1926 A. C. 497⁴ and in fact their Lordships were of opinion that 1926 A. C. 497⁴ was wrongly decided. If, however, 1926 A. C. 497⁴ governs the present case, it must be followed in spite of the criticisms levelled at the decision in the speeches of their Lordships in (1942) 1 ALL E. R. 337.⁵ The facts of the case in 1926 A. C. 497⁴ were as follows. The respondents chartered a steamship to the appellants for ten months from 1st March 1917; the charter contained an arbitration clause. In the latter part of February 1917, the ship was requisitioned by the Government and was not released for two years, till the latter part of February 1919. The charterers did not exercise an option which they had under the charter of cancelling it, and in May 1917, said that they would require the steamer when released. In March 1919, the respondents offered the steamer to the appellants who refused to accept it. The respondents claimed a right to proceed under the arbitration clause in the charter and nominated an arbitrator who made an award in their favour in the absence of the appellants, who took no part in the proceedings.

Their Lordships of the Privy Council held that as the objects of the charter-party had been completely frustrated by the requisition, it had come to an end, and the arbitrator had no jurisdiction in the matter. It will be seen that their Lordships of the Privy Council held that the effect of frustration was the annulment or rescission of the contract. With the annulment of the contract the arbitration clause disappeared. Hence a reference to arbitration could not be made and the arbitrator had no jurisdiction to make an award. In my judgment, however, 1926 A. C. 497⁴ does not decide that the arbitration clause would disappear in all cases as a result of frustration and that I think is clear from the judgment of Lord Sumner. It must be remembered that in 1926 A. C. 497⁴ the contract was frustrated when it was wholly executory. At pages 509-511 Lord Sumner observed :

"Language is occasionally used in the cases which seems to show that frustration is assimilated in the speaker's mind to repudiation or rescission of contracts. The analogy is a false one. Rescission (except by mutual consent or by a competent Court) is the right of one party, arising upon conduct by the other, by which he intimates his intention to abide by the contract no longer. It is a right to treat the contract as at an end, if he chooses, and to claim damages for its total breach, but it is a right in his option and does not depend in theory on any implied term providing for its exercise, but is given by the law in vindication of a breach. Frustration, on the other hand, is explained in theory as a condition or term of the contracts, implied by the law *ab initio*, in order to supply what the parties would have inserted had the matter occurred to them, on the basis of what is fair and reasonable, having regard to the mutual interests concerned and of the main objects of the contract. It is irrespective of the individuals concerned, their temperaments and failings, their interests and circumstances. It is really a device, by which the rules as to absolute contracts are reconciled with a special exception which justice demands.

There is, however, this point of contact between the two cases. Though a party may exercise his right to treat the contract as at an end, as regards obligations *de futuro*, it remains alive for the purposes of vindicating rights already acquired under it on either side. So with frustration. Though the contract comes to an end on the happening of the event, rights and wrongs, which have already come into existence, remain, and the contract remains too, for the purpose of giving effect to them.

No question of this sort, however, arises here. The contract was wholly executory. The ship was requisitioned before she was placed at the charterers' disposal; the performance of the charter never began, and the failure to begin it by tendering the ship at Singapore was excused in the owners' favour by the excepted restraints of princes. Under these circumstances, by the year 1919, when a dispute first arose, 'this charter' no longer existed. The dispute was not one of which it could be predicated that it was one arising under 'this

charter,' since that had terminated by frustration a year before. An arbitration clause is not a phoenix, that can be raised again by one of the parties from the dead ashes of its former self. By its very terms, as well as by the fact that it was only one part of the indivisible charter, it had come to an end also; it is unnecessary to consider in what terms, if any, a clause might have been framed which would have saved the clause alive in the event of the frustration of the adventure and the charter."

Tek Chand J., in 23 Lah. 788¹ relies on the latter portion of these observations of Lord Sumner. But, in my view, he omitted to give weight to the earlier portions of the same observations, where the frustration occurred whilst the contract was wholly executory. Lord Sumner said that the charter-party was terminated before any dispute could possibly arise and that any dispute which arose subsequent to such termination could not possibly be within the arbitration clause which came to an end with the contract. The learned Lord, however, makes it clear that in cases of frustration the contract remains alive for the purposes of vindicating rights already acquired under it on either side. He, therefore, drew a sharp distinction between cases of frustration of contracts wholly executory and frustration of contracts partly performed, where frustration comes after part performance of the contract, the contract, according to Lord Sumner, remains alive for the purposes of vindicating rights already acquired by either party. If the contract remains alive for the purposes of vindicating rights already acquired before frustration, it appears to me to follow inevitably that the arbitration clause remains alive for the purpose of adjudicating upon such rights. Lord Simon L. C., in (1942) 1 ALL E. R. 337,⁵ though disagreeing with Lord Sumner's decision in 1926 A. C. 497,⁴ points out that the grounds for that decision were that the execution of the contract had not begun and that the dispute first arose when the charterparty no longer existed. At pages 342-43 of (1942) 1 ALL E. R. 337,⁵ Lord Simon observed :

"Last, in this trilogy of difficult decisions comes the judgment of the Judicial Committee in 1926 A. C. 497.⁴ It was the case of a time charterparty, where the ship was requisitioned on behalf of His Majesty's Government before the date at which she was to have entered upon the performance of the charter and remained in government service until more than a year had elapsed after the period of ten months during which her service under the charter was to have been rendered. The judgment of their Lordships, delivered by Lord Sumner, contains an elaborate and authoritative exposition of the nature of frustration, and a contrast between the operation of frustration, which is automatic, and the consequences of wrongful repudiation,

which depends upon the choice of the other party. On this point, the judgment has always been regarded as a pronouncement of the highest authority; but I confess to considerable difficulty in accepting the conclusion that the dispute whether such a requisition had frustrated the performance of the charterparty, or whether, on the other hand, the shipowner was entitled to damages for the charterers' refusal to take delivery of the ship when she was at length released, was not a 'dispute arising under this charter.' Lord Sumner held that it was not, on the ground that the execution of the contract had not begun, and that the dispute first arose when 'this charter' no longer existed."

It appears to me, therefore, that 1926 A. C. 497⁴ is only an authority for the proposition that when a contract wholly executory is frustrated, an arbitration clause contained in it cannot be relied upon. On the other hand, it seems to me clear from Lord Sumner's judgment that if the contract had been performed in part before its frustration, the contract would remain alive for the purposes of adjudicating upon the question of the rights of the parties and, as I have said, if the contract remains in existence for the purposes of adjudicating upon such rights, then the arbitration clause certainly exists and remains for that purpose. I am fortified in this view as to the scope of 1926 A. C. 497⁴ by the fact that Lord Sumner approved of the decision of the House of Lords in (1922) 91 L. J. P. C. 167.⁹ This case was also approved of by the House of Lords in (1942) 1 ALL E. R. 337.⁵ In (1922) 91 L. J. P. C. 167⁹ the facts were that by a contract for the purchase and sale of goods, which was made in Scotland, subject to the rules of the Scottish Provision Trade Association, it was provided, *inter alia*, that any dispute on the contract was to be settled by arbitration in the usual way and further that all disputes arising out of the contracts subject to the rules should on demand by either party, be referred to the Arbitration Committee of the Association. A dispute having arisen between the parties as to the quality of the goods, the sellers claimed to have the matter referred to arbitration, as provided by the contract. The buyers replied that the sellers having repudiated their obligation under the contract could not now enforce the arbitration clause. It was held that by the law of Scotland the dispute must be referred to arbitration, as provided by the contract, and could not be entertained by the civil Court. In that case, it is to be observed that

there was a denial that the contract had been repudiated and it was held that the arbitration clause applied. Dealing with this case Lord Simon L. C., in (1942) 1 ALL E. R. 337⁵ at page 341 observed :

"Even so, I do not see how this claim, however expressed, together with the other claims in the writ, can be regarded otherwise than as involving a dispute in 'respect of the agreement' and in respect of something arising out of it. The fallacy of the other view arises from supposing that, if the respondents have so acted as to refuse further performance of the agreement, this amounts to saying that they deny that the agreement ever existed. If the respondents were denying that the contract had ever bound them at all, such an attitude would disentitle them from relying on the arbitration clause which it contains; but that is not the position they take up. They admit the contract, and deny that they have repudiated it. Whether they have, or have not, is one of the disputes arising out of the agreement. Even if the arbitrator finds that they have, and that, on the appellants' acceptance of the repudiation the contract is at an end, that finding does not oust the arbitrator's jurisdiction. As Viscount Finlay said, in (1922) S. C. (H. L. 117⁹ at p. 121 :

"The proposition that the mere allegation by one party of repudiation of the contract by the other deprives the latter of the right to take advantage of an arbitration clause is unreasonable in itself, and there is no authority to support it."

Moreover, the damages due from the respondents for this breach of the obligations of the agreement, as well as damages for any other breaches of it, are also disputed matters arising 'in respect of' the agreement."

Tek Chand J. in 23 Lah. 788¹ appears to have thought that the decision in (1922) 91 L. J. P. C. 167⁹ was peculiar to Scotch law and was, therefore, not applicable to the present case. The only peculiarity in (1922) 91 L. J. P. C. 167⁹ was the Scottish rule that where an arbitration clause applies, the Courts have no discretion in the matter and cannot allow proceedings in the civil Courts. In the case in 1923 A. C. 480,¹⁰ Lord Dunedin who delivered the judgment observed at p. 489 :

"In truth this point is decided in terms by the recent case in (1922) L. J. P. C. 167.⁹ It was a Scotch case, but in no way depended on any peculiarity of the law of Scotland."

It is, therefore, clear that Tek Chand J. was not right in distinguishing (1922) 91 L. J. P. C. 167⁹ on the ground that it was decided in accordance with Scotch law. By approving of (1922) 91 L. J. P. C. 167⁹ Lord Sumner in 1926 A. C. 497⁴ would, it appears, have held at least that if a contract partly executed was alleged to have been rescinded but the other party denied repudiation by him, such a dispute would be referable to arbitration under the arbitration clause contained in the contract.

9. (1922) 1922 S.C. (H.L.) 117: 91 L. J. P. C. 167: 127 L. T. 597, Sanderson & Son v. Armour & Co. Ltd.

10. (23) 10 A.I.R. 1923 P.C. 66 : 47 Bom. 573 : 50 I. A. 324 : 73 I. C. 436 : 1923 A. C. 480 : 92 L. J. P. C. 163 : 129 L. T. 166, Champsey Bhara & Co. v. Jivraj Balloo Spinning & Weaving Co.

It is to be observed that in the present case the plaintiffs denied their default in para. 15 of their plaint, and pleaded "that in spite of payment of Rs. 1800 the goods were re-sold and the contracts were rescinded without sufficient cause and thus the breach of contract is from the defendants' side who are responsible to pay back Rs. 1800 plus interest to the plaintiffs." In short, the plaintiffs in this paragraph plead that they were not in default and that the sellers had no right to re-sell. In such a case it would appear that Lord Sumner agreed that the dispute would be referable to arbitration under the arbitration clause. Can it make any difference if the dispute is only as to damages? In my view it cannot, and that is clear from the observations of Lord Simon L. C., in (1942) 1 ALL E. R. 337⁵ at p. 341 to which I have already made reference and also from the observations of Lord Macmillan at p. 347. There he stated :

"I am accordingly of opinion that what is commonly called repudiation or total breach of a contract, whether acquiesced in by the other party or not, does not abrogate a contract, though it may relieve the injured party of the duty of further fulfilling the obligations which he has by a contract undertaken to the repudiating party. The contract is not put out of existence, though all further performance of the obligations undertaken by each party in favour of the other may cease. It survives for the purpose of measuring the claims arising out of the breach, and the arbitration clause survives for determining the mode of their settlement."

From this discussion it follows, I think, that 1926 A. C. 497⁴ must be confined to cases of frustration of purely executory contracts and cannot be applied to cases of contracts partly performed and which are later frustrated. 1926 A. C. 497⁴ in my view was never intended to apply to cases of rescission by acceptance of a repudiation, that is to cases of anticipatory breaches of contract, as in such cases the initial cause of the rescission, whether the contract is executory or not, is a repudiation or a breach of contract. Where rescission occurs in such circumstances, the contract must remain for the purposes of vindicating the rights acquired by the other party as a result of such breach. Similarly, 1926 A. C. 497⁴ cannot, in my view, apply to cases of re-sale under S. 54, sub-s. (4), Indian Sale of Goods Act. The right to re-sell under the power contained in the contract only arises in executory or partly executed contracts on the buyer's default or breach of contract. If the seller elects to rescind the contract and re-sells, the contract must remain alive for the purpose of enforcing any claim for damages in respect of the

buyer's default or breach. Where on the other hand, a contract is frustrated, it comes to an end not because of any breach by either party but by operation of law. In the words of Lord Sumner in 1926 A. C. 497⁴ at p. 510,

"frustration, on the other hand, is explained in theory as a condition or term of the contract, implied by the law *ab initio*, in order to supply what the parties would have inserted had the matter occurred to them, on the basis of what is fair and reasonable, having regard to the mutual interests concerned and of the main objects of the contract."

Frustration of a contract, therefore, puts an end to the contract without a breach by either party and no question of damages can possibly arise unless the contract was partly performed before frustration. On the other hand, in cases of rescission under either S. 54, sub-s. (4), or S. 60, Indian Sale of Goods Act, questions of damages can arise though the rescinded contract was purely executory. That being so, 1926 A. C. 497⁴ can have no application to cases falling within either S. 54, sub-s. (4), or S. 60, Indian Sale of Goods Act, and in my judgment the decision of the House of Lords in (1942) 1 ALL L. R. 337⁵ is applicable to such cases. The cases in 23 Lah. 788¹ and 45 P. L. R. 287³ can no longer, therefore, be regarded as good law and must be overruled. Where rescission occurs as a result of a re-sale under S. 54, sub-s. (4), Indian Sale of Goods Act, there is only a rescission in the limited sense as defined in (1942) 1 ALL E. R. 337⁵ and the arbitration clause survives for the adjudication of any claims arising from breach of contract. For these reasons, I would, therefore, answer the question submitted to the Full Bench in the affirmative.

Abdul Rashid J. — I agree.

Beckett J. — As a member of the Division Bench responsible for the decision which has given rise to the present reference, I have no hesitation in differing now from what I said then. I was misled by the fact that the word "rescind" has come to be used in connection with contracts of sale in a sense different from its ordinary dictionary sense, which involves the idea of complete annulment. This is made clear by Lord Macmillan in (1942) 111 L. J. K. B 241⁶ in the following passage :

"I am accordingly of opinion that what is commonly called repudiation or total breach of a contract, whether acquiesced in by the other party or not, does not abrogate a contract, though it may relieve the injured party of the duty of further fulfilling the obligations which he has by a contract undertaken to the repudiating party. The contract is not put out of existence, though all further performance of the obligations undertaken

by each party in favour of the other may cease. It survives for the purpose of measuring the claims arising out of the breach, and the arbitration clause survives for determining the mode of their settlement. The purposes of the contract have failed, but the arbitration clause is not one of the purposes of the contract."

Lord Porter says much the same thing with reference to frustration in the following passage at p. 264 of (1942) 111 L.J.K.B. 241:⁶

"The same observations as apply to accepted repudiation apply, I think, to frustration. The phrase 'frustration of the contract' is as inaccurate in expression as is the phrase 'rescission of the contract by repudiation.' The contract is not frustrated; its future performance or the adventure is frustrated."

To some extent this would also appear from the following remarks by Lord Sumner in 1926 A. C. 497⁴ following on the distinction which he draws between rescission and frustration :

"There is, however, this point of contact between the two cases. Though a party may exercise his right to treat the contract as at an end, as regards obligations *de futuro*, it remains alive for the purpose of vindicating rights already acquired under it on either side. So with frustration. Though the contract comes to an end on the happening of the event, rights and wrongs, which have already come into existence, remain, and the contract remains too, for the purpose of giving effect to them."

That case, so far as the main part of the contract was concerned, was a true case of frustration, for the contract came to an end before anything had been done, which distinguishes it from cases in which rights and wrongs have already come into being before the contract is rescinded, as it is said. It is to be observed that Lord Sumner himself delivered judgment in (1922) S. C. (H. L.) 117⁹ to which a reference is made in 1926 A.C. 497.⁴ The use of the word "rescission" in the special sense may have come into existence as a result of Lord Denham's attempt to explain the power of a vendor to resell property in which property has already passed, when the transfer of ownership is regarded as annulled. So far as the contract of sale is concerned, it would be more correct to say that it is terminated. It does not seem to me to matter much whether the arbitration clause is regarded as independent of the contract of sale or not. If it is the intention of the parties that disputes arising over rescission should be referred to arbitration, and disputes resulting from an alleged breach of the contract would clearly seem to be disputes arising out of the contract, there appears to be no sufficient reason why the intention of the parties should not be allowed to prevail, whether this is made a part of the contract of sale or not. This

aspect of the matter is also brought out in certain remarks made by the noble and learned Lords in (1942) 111 L.J.K.B. 241.⁵ For these reasons I agree with the answer proposed to be given by my Lord the Chief Justice.

Ram Lall J. — I agree and have only a few observations to add. The learned Chief Justice has made it clear that (a) the arbitration clause in this case is couched in the widest possible terms and (b) that the word "rescission" is used in an identical sense in S. 60 dealing with anticipatory breach of contracts and in S. 54 dealing with the right of re-sale on breach by the other party and that in either case of rescission parties are absolved from further obligations under the contract but the question of damages is still at large. The main argument on behalf of the appellant is founded on the authority of 23 Lah. 788,¹ the facts of which were very similar to those of the present case, and that case, therefore, deserves closer examination. In that case there were several contracts for the sale of goods and in each there was an arbitration clause framed in as wide terms as in the present case. Goods were tendered by the sellers but the purchaser firm refused to accept delivery, whereupon the sellers re-sold the goods apparently in accordance with the provisions of S. 54, Sale of Goods Act, and as there was a loss on the re-sale of the goods, the sellers sought to enforce the reference to arbitration for the determination of disputes that had so arisen, and secured an award in their favour for damages. When they wanted to enforce the award by applying to have it made a rule of Court, a suit was instituted by the purchaser firm for a declaration that the sellers had no right to refer any disputes to arbitration, that the arbitrators had no right to entertain the reference and the arbitration proceedings were consequently without jurisdiction and so null and void. It was contended firstly that the original contracts had been induced by misrepresentation and fraud, secondly, that the purchasers were justified in refusing to take delivery and, lastly, that on the exercise of the option to re-sell the whole contract was rescinded, wiping out the arbitration clause under which alone the arbitrators had jurisdiction to act. The trial Court held that the contracts were not shown to have been induced by fraud and the arbitration clause subsisted for the determination of damages. On appeal I upheld this decision and held that no fraud in the formation of the contract in the

sense that no contract would have been entered into if fraud had not been practised, was proved, and that the arbitration clause was effective notwithstanding the rescission of the contract as the whole contract was not completely wiped out but was still operative for the determination of damages. I ventured to hold on a consideration of how, after the decision in 72 R. R. 502¹¹ the English Sale of Goods Act was amended, that what alone was rescinded was the contract of sale whereby the seller transfers property in the goods to a buyer for a price and this in order to enable a person exercising his right of re-sale to pass property in the goods re-sold to the new purchaser. I said

"in other words, when option is exercised under sub-s. (4) of S. 54 the purchaser on such sale gets a title in the goods from his seller in consideration for the price paid. The defaulting purchaser in whom the property in the goods initially vested is deprived of the legal title in the goods and the title passed to the new purchaser is not through or on behalf of the defaulting purchaser : All that appears to me to be lost to the original vendee is the property in the goods sold and this constitutes only the contract of sale. This alone appears to me to be rescinded and everything else remains alive and available for the benefit of the contracting parties."

I went on to say

"if what is rescinded is only the contract of sale, then it appears to me that the arbitration clause remains unaffected in so far as it deals with matters other than those that are covered by the definition of the contract of sale as contained in S. 4, Sale of Goods Act. The arbitration clause could, in my opinion, therefore, be validly and properly used for determining what still remains to be determined, namely, a claim for damages that still subsists after the goods have been re-sold in terms of S. 54, sub-s. (4)."

I further was of the opinion that the arbitration clause could be regarded as a separate contract, and that the matter could be looked upon as if two contracts had been embodied in the same instrument. An appeal under the Letters Patent was heard by Tek Chand and Beckett JJ., and Tek Chand J. in delivering the leading judgment held that as defined in Wharton's Law Lexicon and by a commentator (Black on Rescission and Cancellation) the word "rescission" as used in S. 54 (4) should be given its ordinary meaning and the effect, therefore, was to completely annul the contract. He further held that the arbitration clause could not be treated as independent of the main contract and if that contract, of which the arbitration clause was an important condition, was abrogated by operation of law the arbitra-

tion clause perished with it. Reliance in this connection was placed on certain dicta of the Privy Council in 1926 A. C. 497.⁴ Though 1926 A. C. 497⁴ was not a case of rescission but of frustration, the reasoning was held applicable and the case in (1922) 127 L. T. 597⁹ was distinguished on the ground that it was decided under the law of Scotland which was different to the English law. The learned Judge could not view the arbitration clause as anything other than an integral condition of the contract which was in no circumstances severable.

As it seems to me, the primary error in 23 Lah. 788,¹ is that the learned Judge was almost exclusively influenced by the definition given in Dictionaries and commentaries of the word "rescission" used in S. 54, Sale of Goods Act. He relied on the definition given in Wharton's Law Lexicon and in Black on Rescission and Cancellation. Lexicons would only define an expression in terms of a decision given by a Court of law and unless this decision was one given under the Act in which the expression is used it involves a dangerous method of interpretation. So far as Black's work is concerned, it is apparently an American authority unless it is known in what context this expression is used in the American Acts, the definition given in such a commentary ceases to serve any useful purpose. The danger of adopting this course was apparently present to the mind of the learned Judge when he said that the sellers' claim for damages arising out of the buyer's default was kept alive, which, according to the definition of "rescission" adopted by him, would no longer be in issue. He, however, considered that this right to claim damages could be enforced only in a Court of law. I can see no warrant for restricting the remedy of a party in this way as I hope to show later. Assuming, however, that the learned Judge is right in the view that the remedy can be enforced only in a law Court the difficulty still remains because there is no means of assessing damage without reference to the terms of the very contract which according to the learned Judge has been annulled or completely destroyed. In (1923) S. C. (H. L.) 37¹² referred to and relied upon in (1942) 1 ALL E. R. 337⁵ the question came up before the House of Lords in a case where a contract had been partly performed and then frustrated by a Government prohibition of further export. It was contended that with frustration the contract perished

11. (1847) 9 Q. B. 1030 : 16 L. J. Q. B. 136 : 72 R. R. 502, *Lamond v. Davall*.

12. (1923) 1923 S. C. (H. L.) 37, *Scott & Sons v. Del Sel*.

and with it the arbitration clause. The contention that the dispute as to frustration was not a dispute under the contract was unanimously rejected. Lord Dunedin said that to succeed the sellers had to show that the contract was brought to an end either by an express term or by an implied term such as frustration. He observed:

"It seems to me, therefore, that they (the sellers) are in this dilemma, that in either view they have got to have recourse to the contract, and, if they have got to have recourse to the contract, it seems to me that the dispute is a dispute under the contract."

The second error on which the decision in 23 Lah. 788¹ appears to me to be based is the attempt to restrict the remedy of damages for breach to a law Court to the exclusion of the arbitral Court. If a dispute exists under the contract for the limited purpose of assessing damages for the breach of that contract, the contract is kept alive to enforce that remedy and I can see neither principle nor authority for restricting the mode of enforcement to law Courts and excluding the method agreed to by the parties themselves in the contract itself. Parties have agreed to have all disputes arising out of the contract decided by a domestic tribunal of their own, but when the only dispute that can be fought out is confined to the liability for or the quantum of damages the parties are on this interpretation restricted to a tribunal not of their own choice but to the regular Courts. In effect, if this reasoning be correct, for the contract entered into between the parties as to the forum for the decision of the dispute another contract is substituted by operation of law.

The third feature to which sufficient importance has not been given in this decision is the effect of rescission when a contract has been breached by the other party. Such cases arise only when there has been such a breach that the contract cannot be performed any further and what alone is left is a claim for money by way of damages. The question then arises, what is meant by the termination of the contract. All contracts contain reciprocal obligations. When one party so acts that he will not or cannot carry out his essential obligations under the contract the other party has a right to terminate the contract. Such termination only means that the party entitled or claiming to be entitled to terminate need not perform his obligations any longer but this does not mean that obligations that have already arisen between the parties are wiped out or that the mode of enforcing these liabilities

can become different to what was agreed to between the parties. The mode of adjusting these liabilities once it is found that the liabilities such as damages exist, appears to me itself a contractual obligation. To hold otherwise would in the words of Lord Wright in (1942) 1 ALL E. R. 337⁵ be to allow "defiance or truculence of a party to affect the matter." If one party breaks an essential part of a contract, say by refusing to take delivery of all the goods contracted to be supplied, it would be a strange result, if when the party injured seeks to enforce his rights, were to be told that the rights that had accrued to him had been limited because the contract had been so breached. This aspect of the matter was directly in point in (1922) 127 L. T. 597⁹ where a purchaser of goods to be delivered by instalments contended that the first instalment was not up to standard and refused to accept other instalments without an opportunity of previous examination. The sellers refused this opportunity and the buyers claiming to rescind the contract brought an action for damages. The sellers invoked the arbitration clause in the contract and the case went up to the House of Lords where it was held that the question whether one party or the other has by his actings repudiated the contract is a question for the arbitrator. In 23 Lah. 788,¹ this decision was brushed aside on two grounds; (1) that it was decided according to the law of Scotland and (2) that the contract had terminated not because a party had repudiated it but because it was cancelled by operation of law, a ground on which it was claimed this decision had been distinguished by Lord Sumner in 1926 A. C. 497.⁴ Now, the learned Chief Justice has shown that the first ground of distinction is incorrect because, as pointed out in the Privy Council by Lord Dunedin in 1923 A. C. 480¹⁰ the decision in (1922) S. C. (H. L.) 117⁹ in no way depended on the law of Scotland. Regarding the second ground of distinction, it may be noted that Lord Dunedin was a party to the decision in 1926 A. C. 497⁴ though the judgment was delivered by Lord Sumner. As I read that judgment, (1922) S. C. (H. L.) 117⁹ was not distinguished on the grounds stated in 23 Lah. 788.¹ The only reference to this decision is in the following passage at pages 503 to 504 of 1926 Appeal Cases⁴:

"An arbitrator under an ordinary arbitration clause may have jurisdiction to construe the contract, which contains the submission, and to find for or against trade customs said to be incorpo-

rated with it : (1916) 1 A. C. 314,¹³ or to adjudicate upon breaches of a contract, partly or wholly performed, but still in existence, for the purpose of awarding damages for such breaches already committed, even though it is determined as regards future performance by repudiation on one side and acceptance on the other : (1922) S. C. (H. L.) 117;⁹ (1923) A. C. 480.¹⁰ This proposition is quite different from saying that a dispute, which might have arisen under the contract containing the submission, if it had not come to an end without fault on either side, is a dispute submitted thereunder, when the contract itself no longer exists."

If the contract is not rescinded in the sense that the contract is blotted out completely and the parties relegated to the position they would have occupied if no contract had been entered into at all, the question remains what portion of the contract is rescinded and what survives after one of the parties to it takes action under S. 54, sub-s. (4), Sale of Goods Act. I ventured to say in the judgment which was reversed by 23 Lah. 788¹ that what was rescinded was the contract of sale as defined in S. 4, Sale of Goods Act, whereby property was transferred from one party to the other for a price and I still consider that this is all that is rescinded. When the contract of sale is initially made, the property in the goods passes to the purchaser though delivery has not yet taken place. When the purchaser refuses to take delivery of the goods sold and the law gives the seller an option of re-sale, the law must make provision for investing the second purchaser on re-sale with property in the goods. The title that vested in the original purchasers of necessity to be wiped out before legal title can be conferred on the person who buys when goods are re-sold. This new purchaser derives title in the goods from the original seller and not from the defaulting purchaser in whom the property initially vested and whose title must be eliminated to secure the title of the new purchaser. This was the position in (1847) 9 Q. B. 1030¹¹ which led to this provision being enacted in S. 48, English Sale of Goods Act, which provision was bodily incorporated as sub-s. (4) of S. 54 of the Indian Act. In (1847) 9 Q. B. 1030¹¹ certain shares were sold by a broker to a customer for £79 subject to the condition that the goods could be re-sold if the price was not paid the next day. The price was not so paid and on a re-sale in terms of the contract the goods fetched £63. A contention was raised that on the re-sale the first sale had become void. It was held that the first sale was annulled apparently be-

cause without doing so no re-sale could take place whereby the property could pass to the new purchaser for £63. The broker was not the agent of the original purchaser because on the sale being annulled the original purchaser had no property left in the goods as soon as he was unable to fulfil the conditions subject to which the goods were sold. The sale in this case was held to be conditioned to be void in case of default, and the defaulter was liable only for the difference in price and expenses. In other words, the original sale was set aside on the non-fulfilment of a stipulated condition, but the right of damages still existed and this right of damages could only arise out of the original contract.

The last ground on which I venture to consider that 23 Lah. 788¹ did not lay down a correct rule of law is that the arbitration clause was not viewed as a severable portion of a contract. It appears to me that the arbitration clause can be regarded as a thing apart from the main conditions of a contract and it is not a necessary clause in the contract. The main contract deals with the performance of mutual obligations and how they are to be performed, whereas the arbitration clause deals only with the procedure for determining liabilities created by the contract, and the arbitration clause itself creates no liability. In most cases this clause is embodied in the same instrument but it is possible to enter into a contract to refer disputes which may arise under a contract which has been entered into previously or even after the performance of such a contract has begun. This bilateral aspect of the arbitration clause appears to me to be supported forcibly by the observations of all the Law Lords who were parties to the decision in (1942) 1 ALL E. R. 337⁵ referred to by the learned Chief Justice. Viscount Simon L. C. observed, at p. 342 of the report, that it seemed "impossible to construe the language of an arbitration clause as though its range could be reduced by the action of one of the parties. Its range depends on its terms."

Lord Macmillan, with whom Lord Russell of Killowen fully agreed, observed at p. 347:

"I venture to think that not enough attention has been directed to the true nature and function of an arbitration clause in a contract. It is quite distinct from the other clauses. The other clauses set out the obligations which the parties undertake towards each other *hinc inde*; but the arbitration clause does not impose on one of the parties an obligation in favour of the other. It embodies the agreement of both parties that, if any dispute arises with regard to the obligation which the one party has undertaken to the other, such a dispute shall be settled by a tribunal of their own constitu-

13. (1916) 1 A. C. 314 : 85 L. J. K. B. 160 : 114 L. T. 94, Produce Brokers Co. v. Olympia Oil & Cake Co.

tion. Moreover, there is this very material difference that, whereas in an ordinary contract the obligations of the parties to each other cannot in general be specifically enforced and breach of them results only in damages, the arbitration clause can be specifically enforced by the machinery of the Arbitration Acts. The appropriate remedy for breach of the agreement to arbitrate is not damages but its enforcement. Moreover, there is the further significant difference that the Courts in England have a discretionary power of dispensation as regards arbitration clauses which they do not possess as regards the other clause of contract.

I am accordingly of opinion that what is commonly called repudiation or total breach of a contract, whether acquiesced in by the other party or not, does not abrogate a contract, though it may relieve the injured party of the duty of further fulfilling the obligations which he has by a contract undertaken to the repudiating party. The contract is not put out of existence though all further performance of the obligation undertaken by each party in favour of the other may cease. It survives for the purpose of measuring the claims arising out of the breach, and the arbitration clause survives for determining the mode of their settlement. The purposes of the contract have failed, but the arbitration clause is not one of the purposes of the contract."

And again when dealing with the argument raised that a party should not be allowed to repudiate a contract by refusing to perform his obligations under a contract and yet insist on relying on the arbitration clause embodied in it, the learned Judge observed :

"The key is to be found in the distinction which I have endeavoured to draw between the arbitration clause in a contract and the executive obligations undertaken by each party to the other. I can see nothing shocking or repugnant to law in one business man saying to another that he regrets he finds himself unable to go on with his deliveries under a contract between them, and at the same time asking the other to join with him in a reference under an arbitration clause in their contract in order to ascertain what compensation is to be paid for his default. The parties have both agreed that all questions between them shall be settled by their own tribunal. The question of the consequences which are to follow from a breach, including a total breach, of the obligations undertaken by one of the parties is just such a question as both parties have agreed should go to arbitration. It is not a case of one party refusing to perform the obligations he has undertaken in favour of the other and at the same time insisting that obligations in favour of himself shall continue to be performed. The arbitration clause, as I have said, is not a stipulation in favour of either party."

Lord Wright, at p. 349 of the report after referring to (1941) 2 ALL E. R. 165,¹⁴ observed as follows :

"That illustrates clearly one aspect of an arbitration agreement, namely, that it is collateral to the substantial stipulations of the contract; it is merely procedural and ancillary; it is a mode of settling disputes, though the agreement to do so is itself

subject to the discretion of the Court. All this may be said of every agreement to arbitrate, even though not a separate bargain, but one incorporated in the general contract. It may also be noted that the agreement to arbitrate depends on there being a dispute or difference in respect of the substantive stipulations. It appertains to the stage of pleadings or allegations. It is in regard to these that it has to be decided whether the submission applies or should receive effect. It is interlocutory. Again, the illustration I have given shows that there may be an agreement to arbitrate upon a question on a contract which has on one view ceased to exist, at least as to future performance, though whether it has ceased to exist or not is disputed, or, if that is not disputed, the question of damages remains in dispute. It must depend on the construction of the collateral agreement contained in the arbitration clause, whether that agreement survives and can be insisted upon for the settlement of these disputes."

A little further he observed at page 350 :

"There, again, it would be a question of construction whether the collateral arbitration clause could be treated as severable and could be invoked for settling such a dispute."

And again at page 353 the learned Judge observed when dealing with the argument that if an arbitrator decided that a contract had been rescinded properly

"he would be awarding that the contract was gone and making an award against the existence of his own jurisdiction. I should prefer to put it that the existence of his jurisdiction in this as in other cases is to be determined by the words of the submission. I see no objection to a submission of the question whether there ever was a contract at all or whether if there was, it had been avoided or ended. Parties may submit to arbitration any or almost any question."

Lord Porter observed at page 357 :

"Meanwhile, I think it essential to remember that the question whether a given dispute comes within the provisions of an arbitration clause or not primarily depends upon the terms of the clause itself. If two parties purport to enter into a contract and a dispute arises as to whether they have done so or not, or as to whether the alleged contract is binding upon them, I see no reason why they should not submit that dispute to arbitration. Equally, I see no reason why, if at the time when they purport to make the contract they foresee the possibility of such a dispute arising, they should not provide in the contract itself for the submission to arbitration of a dispute as to whether the contract ever bound them or continues to do so.

I think that the right to insist upon arbitration differs from the claim to require the further performance of the other terms and conditions of the contract. In respect of these latter, the injured party may be excused from further performance after essential breach and acceptance of that breach as a renunciation of the contract: *see* (1909) A. C. 118,¹⁵ a case in which a servant wrongfully dismissed was held no longer bound by a clause restricting his right to trade after the determination of his service.

So far, however, as arbitration is concerned, the injured party must abide by the arbitration clause for it is severable and expressly inserted to deal

14. (1941) 2 All E. R. 165 : 110 L. J. K. B. 433 : 165 L. T. 27, *Joseph Constantine S. S. Line v. Imperial Smelting Corporation Ltd.*

15. (1909) 1909 A. C. 118 : 78 L. J. Ch. 77 : 99 L. T. 943, *General Billposting Co. v. Atkinson.*

with breaches including such breaches by repudiation."

I have quoted extensively from the observations made in this case because the House of Lords felt that doubts had arisen by earlier pronouncements on the general question of the efficacy of arbitration clauses and desired to set these doubts at rest by an authoritative pronouncement after hearing full arguments. It appears to me to be established conclusively from these weighty observations that the contract on rescission on the re-sale of goods is not wiped out of existence but that the original contract is the only measure of the liability for damages. So long as a dispute exists under or arising out of the contract, the arbitration clause must receive its full effect. The contract to refer disputes so arising can be regarded as an independent agreement, ancillary and collateral to the main conditions of the contract, providing machinery for the mode of settlement of subsisting disputes which on the termination of the contracts in the case of sale of goods is confined to damages in terms of money.

There is one further matter to which I would like to make reference. Much has been said about 1926 A. C. 497,⁴ and it is clear that the decision in that case is binding on the Courts in India. The decision of that case, however, does not appear to me to conflict with the view of the arbitration clause that I have ventured to express and there are important observations in it which indeed support that view. The facts of this case have already been stated in the judgment of the learned Chief Justice. Suffice it to say here that the contract had been frustrated long before any portion of the contract could have been performed. Lord Sumner in delivering the judgment of the Privy Council examined the meaning, scope and effect of frustration. The doctrine of frustration rests on an implied term in the contract, that the parties would have, had they anticipated it, made provision for the happening of an event such as restraint of princes which frustrated the object of the adventure. In other words, the parties should be deemed by necessary implication to have contracted that if Government requisitioned the ship before it could be tendered, there would be no liability for failure to tender and conversely if the tender could not be made it could not be accepted. It is said at p. 505 of 1926 A. C.:⁴

"The legal effect of frustration is the immediate termination of the contract as to all matters and disputes which have not already arisen."

Now, it appears to me that the ground on which the decision in 1926 A. C. 497⁴ rests is that no dispute could arise till the time of performance began, neither party having shown an intention not to be bound by the contract before 1st March 1917. When frustration took place on the requisition of the ship by Government, both parties were excused from the further performance of the case, and, therefore, there were no disputes that could be submitted to an arbitrator. By frustration the law provided "an immediate termination of the obligations as regards future performance" and as "frustration operates automatically," there was no breach on which a claim for damages could be founded. Lord Wright, in (1942) 1 ALL E. R. 337,⁵ observed at p. 352 of the report:

"Frustration, if it occurs, no doubt puts an end to the contract for the future as much as does rescission after repudiation or any other whole breach, though in that case there is a claim for damages for breach, while in respect of frustration there is no claim for damages."

As I have endeavoured to show when a contract is repudiated and then rescinded, the only claim that survives is one for damages and if by the factum of frustration a claim for damages cannot be put forward, there is no dispute which can be made the subject-matter of an award. The foundation of the jurisdiction of an arbitrator is the existence of a dispute which is submitted to him for decision. It will be seen, therefore, that 1926 A. C. 497⁴ was one where the contract was executory and which was frustrated long before performance could begin. Lord Sumner himself stated at p. 510 of the report in 1926 A. C.:⁴

"Though a party may exercise his right to treat the contract at an end as regards obligations *de futuro*, it remains alive for the purpose of vindicating rights already acquired under it on either side."

In the present case, there has been a breach of a term of the contract. Neither party contends that the contract was never entered into or that it was induced by fraud or misrepresentation. The same would be the case if a party indicated to the other that he would not carry out his bargain or placed himself in a position in which he could not perform his part of the contract. On the happening of such an event, a claim immediately would have arisen which as I read the judgment of Lord Sumner can be decided only as the contract stipulated and therefore the contract would still be alive to provide the remedy for its breach.

But to use the frequently quoted words of Lord Halsbury, a case is authority for no

more than it decides and it is dangerous to argue by analogy or logic. 1926 A. C. 497⁴ dealt only with the effect of frustration of wholly executory contracts and its analogy cannot be extended to cases of contracts which have been partly performed and cases like the refusal to tender or to take delivery of a whole instalment or other forms of anticipatory breaches. Confining that decision within these limits, I can see nothing from which it can be held that when a party rescinds a contract by exercising the option which S. 54 (4) gives him, the whole contract is put out of existence together with the collateral arbitration clause whether contained in that contract itself or in another instrument and I find a good many observations which support the contrary proposition. It is true that at p. 502 of the report in 1926 A. C. 497⁴ it is said:

"His (the arbitrator's) authority depends on the existence of some submission to him by the parties of the subject-matter of the complaint. For this purpose, a contract that has determined is in the same position as one that has never been concluded at all. It finds no justification."

These remarks, I think, can be understood as meaning that there was no dispute which could result in damages and that, therefore, there was no valid submission before the arbitrator. In any event, these observations were obiter and not at all necessary for the decision of the point before their Lordships. For these reasons, I would answer the reference in the terms suggested by the learned Chief Justice.

Mahajan J. — I entirely agree with the decision of my Lord the Chief Justice and the reasons given for that decision. When at the Bar I argued the case in 23 Lah. 788¹ which has given rise to this reference, I was able to persuade my Lord Ram Lall to the view expressed by my Lord the Chief Justice in the present reference, but was unsuccessful before the Letters Patent Bench. Since that decision was delivered, I had a feeling that the rule laid down therein was not sound in law. The House of Lords' decision in (1942) 1 ALL E. R. 337⁵ furnishes ample justification for my view. In the light of this decision, which has been given on the corresponding provisions of the English Sale of Goods Act to S. 60, Indian Sale of Goods Act, I have nothing more to add on the point involved in this reference. I, however, wish to add that the decision of their Lordships of the Privy Council in 1926 A. C. 497⁴ cannot be said to be binding authority on S. 54 (4) of the Indian Statute. That decision did not interpret the relevant sections of the Indian

Sale of Goods Act or the corresponding provisions of English Statute. 1926 A. C. 497⁴ was not a case of rescission at all and that decision did not consider the case of a rescission of a contract after exercise of the right of contractual re-sale. In other words, the question of rescission of a contract of sale arising by reason of re-sale consequent on breach of contract by one of the parties was not considered by their Lordships of the Privy Council in that case. On general principles of English law on which 1926 A. C. 497⁴ was based, the House of Lords in (1942) 1 ALL E. R. 337⁵ have held in clear terms that the decision was erroneous. In my judgment that decision which no longer is good law in England and which was not given on the Indian Statute with which we are concerned cannot be held to be a decision of binding authority on the Courts in this country.

I would like to add that I had the privilege of reading the judgment which my brother Ram Lall J. has just delivered. With great respect I subscribe to the additional reasons given in support of the answer to the reference in that decision. I fully concur in the view that the effect of a contractual resale on the contract, which authorised it, is not to annihilate that contract. But its result is that the property that passed from the seller to the buyer reverts to the seller again and the passing of the property in the goods sold is undone and annulled. Such a re-sale does not make the contract of sale *ab initio void*. Moreover, in its very nature an agreement made between the contracting parties to refer their disputes to arbitration arising out of the contract cannot be said to be an integral part of the contract of sale as defined in the Sale of Goods Act. That Act is not concerned with the forum in which disputes arising out of a sale contract are to be settled. The essence of this agreement is that the parties agreed to nominate a Judge of their own choice to settle their differences if and when they arise. In substance, therefore, such an agreement is an independent agreement and cannot be held to be an integral part of the contract of sale. The observations of their Lordships of the Privy Council in 1926 A. C. 497⁴ that the arbitration agreement could not survive if the contract of sale which was executory in its nature frustrated can have no application to the case of rescission which results from a contractual resale brought about owing to the default of one of the contracting parties. An executory contract

when frustrated dies in embryo and the arbitration clause concerning such a contract cannot be kept alive because it becomes purposeless. Even if it is alive, its existence is futile; but that principle, which is peculiar to a case of frustration of an executory contract, has no relevancy to the case where even the re-sale that results in rescission is by itself contractual and is made on the basis of a living contract and to a case where the claim of damages has been expressly kept alive by the terms of the statute.

[After opinion was expressed by the Full Bench on the question referred, the case was sent back to the Division Bench consisting of Abdul Rashid and Ram Lall JJ. who delivered on 3-12-1945 the following]

Judgment.—Mr. Gandhi on behalf of the appellants, submitted that as the Full Bench had held that the arbitration clause survives for the adjudication of any claims arising from breach of contract, he had nothing more to say in support of the appeal on the merits. He contended, however, that the point of law involved in this case was one of great difficulty and that he was supported in his original contention by a Division Bench judgment of this Court. He urged, therefore, that he should not be burdened with costs and that the parties should be left to bear their own costs throughout. On a reference to the award we find that future interest at 6 per cent. per annum from the date of the award till the date of payment has been awarded to the defendants. In these circumstances, we agree with Mr. Gandhi that the parties should bear their own costs throughout. We, therefore, dismiss this appeal but order that the parties will bear their own costs throughout.

N.S./D.H.

Appeal dismissed.

[Case No. 30.]

* A. I. R. (33) 1946 Lahore 134

FULL BENCH

HARRIES C. J., ABDUL RASHID AND
ACHHRU RAM JJ.

Bhiku Mal — Defendant—Appellant
v.

*Firm Ram Chandar Babu Lal, Plain-
tiff and another, Defendant*

— Respondents.

Second Appeal No. 1120 of 1943, Decided on
16th April 1945, from judgment of Abdur Rahman J., D/- 25th January 1945.

* (a) Civil P. C. (1908), S. 47—Representative
— Purchaser of attached property is representative of judgment-debtor — Question relating

to execution between such purchaser and decree-holder must be determined by executing Court under S. 47—Separate suit is barred (Per Full Bench.)

A purchaser in a private sale of property under attachment from the judgment-debtor is a representative of the judgment-debtor under S. 47 of the Code. The question whether the attached property in his hands is liable to be sold in execution of the decree is a question relating to execution of the decree and must be determined by the executing Court. A separate suit for determination of such question is barred by S. 47 : ('26) 13 A. I. R. 1926 Lah. 134, *Appr.*; ('41) 28 A. I. R. 1941 Mad. 161 (F.B.), *Expl.*; 16 All. 286, *held not good law*; *Case law discussed.* [P 137 C 1; P 140 C 2; P 141 C 1]

C. P. C. —

('44) Chitaley, S. 47, N. 21, Pt. 4.

(b) Civil P. C. (1908), O. 21, R. 83 — Permission cannot be granted after sale is effected by judgment-debtor (Per *Abdur Rahman J.*, in Order of Reference.)

Permission to make a sale cannot be granted under O. 21, R. 83 by the Court after the sale had already been effected by the judgment-debtor without the Court's permission. [P 135 C 2; P 136 C 1]

C. P. C. —

('44) Chitaley, O. 21, R. 83, N. 4.

(c) Civil P. C. (1908), S. 100 — New plea — Objection to validity of attachment cannot be raised for first time in second appeal (Per *Abdur Rahman J.*, in Order of Reference.)

Where no definite objection to the validity of attachment is taken in the lower Courts, a plea, that the attachment was invalid as no notice was affixed on the court house as required by O. 21, R. 54 cannot be raised for the first time in second appeal. In the absence of such a definite objection, the High Court will presume that the attachment was valid and that all necessary steps had been taken which would validate the attachment : ('34) 21 A. I. R. 1934 P. C. 217, *Foll.* [P 136 C 1]

C. P. C. —

('44) Chitaley, S. 64, N. 16.

(d) Civil P. C. (1908), S. 100—New plea—Plea of estoppel cannot be raised for first time in second appeal (Per *Abdur Rahman J.*)

The question of estoppel is a question of fact or in any case a mixed question of fact and law and cannot be raised for the first time in second appeal. [P 141 C 2]

C. P. C. —

('44) Chitaley, S. 100, N. 60.

(e) Civil P. C. (1908), S. 47 — Separate suit — Estoppel against raising plea of bar of suit (Per *Abdur Rahman J.*)

A purchaser in a private sale from the judgment-debtor preferred an objection to attachment describing as one under O. 21, R. 58. The objection was allowed and the decree-holder brought a suit under O. 21, R. 63. The purchaser contended that the suit was barred under S. 47 :

Held that the purchaser was not estopped from raising the plea merely because he had described his objection as falling under O. 21, R. 58 instead of under S. 47. [P 141 C 2]

C. P. C. —

('44) Chitaley, S. 47, N. 73.

(f) Civil P. C. (1908), S. 47 (2) — Conversion of suit into execution proceedings — Suit filed

in Court different from executing Court — Suit cannot be converted into execution proceedings. (Per *Abdur Rahman J.*)

A purchaser in a private sale from judgment-debtor preferred an objection to attachment in the Court of Senior Subordinate Judge which was the executing Court. The objection was allowed and the decree-holder filed a suit under O. 21, R. 63 in the Court of Sub-ordinate Judge of the 4th Class. The suit was decreed by the trial Court and the appeal of transferee was dismissed by the District Judge. In second appeal it was held that the suit was barred under S. 47. It was then contended for the decree-holder that the suit may be allowed to be converted into executing proceedings under S. 47 :

Held that this could not be done as the Court before which the suit was instituted was different from the execution Court and could not decide the matter on the execution side. [P 141 C 2]

C. P. C. —

(44) Chitaley, S. 47, N. 83, Pt. 10.

Bishen Narain — for Appellant.

Faqir Chand Mittal — for Respondents.

ORDER OF REFERENCE.

Abdur Rahman J.—Messrs. Ram Chander Babu Lal brought a suit in the Court of the Senior Subordinate Judge at Gurgaon for recovery of Rs. 4256-2-9 against Mul Chand on 6th July 1938. They made an application for attachment before judgment of five items of property at Palwal in Gurgaon district under O. 38, R. 5, Civil P. C., on the following day. It was granted and a warrant of attachment was ordered to be issued as required by law. It was issued but the copy of the warrant on the record shows that the judgment-debtor was not called upon to furnish security. The bailiff reported on 8th July 1938, (Ex. P. 3) that the attachment had been effected. It was also reported that the judgment-debtor was not found in spite of diligent search and that a notice was therefore affixed on the public road, on the properties attached and on the house of the judgment-debtor. The suit was decreed on 18th February 1939. The decree-holder applied for execution by attachment of movable and immovable properties and by arrest of the judgment-debtor on 24th February 1939. The properties which had been attached before were re-attached on 8th April 1939. Bhikhu Mal a legal representative of Khem Chand objected to the attachment under O. 21, R. 58, Civil P. C., on the ground that Khem Chand had purchased the property in suit with the sanction of the Court in a different decree. These objections were allowed on 28th July 1939. Messrs. Ram Chander Babu Lal then brought the suit, out of which the present appeal arises, under O. 21, R. 63, Civil P. C. The suit was decreed by both the

Courts below and Bhikhu Mal has come up in second appeal.

Bir Bhan secured a decree against Hira Lal and Mul Chand of about six or seven thousand rupees. A copy of the decree was not placed on the record and it is not possible to say when the decree was passed or for what amount but it appears that Khem Chand was the assignee of that decree. Mul Chand, one of the judgment-debtors, applied to the Senior Subordinate Judge at Gurgaon (Ex. P. 5) for leave to sell the property in dispute on 25th March 1939, under O. 21, R. 83, Civil P. C. No order or warrant for attachment has been produced but there is a reference in this application to the attachment having been effected. That by itself would not prove an attachment particularly against Messrs. Ram Chander Babu Lal who were no parties to those proceedings. It is unnecessary, however, to pursue that matter any further as I find that the only order passed on the judgment-debtor's application on 27th March 1939 was to the effect that it would be considered when the question of sale was considered (Ex. P. 6). It is not quite easy to say what was meant by that order but the fact remains that Mul Chand sold the property in dispute for Rs. 400 to Khem Chand on 3rd April 1939. The parties or their counsel appeared before the Court on 21st April 1939, and the Court passed an order that two items of property had been sold for Rs. 400 and Rs. 800, that the purchasers might deposit the money in Court and that any objections regarding rateable distribution might be presented if they existed.

Three questions were argued before me by learned counsel for the appellant : (a) Whether the sale to Khem Chand on 3rd April 1939 was with the leave of the Court ? (b) Whether the attachment of 8th July 1938 was valid ? and (c) Whether the suit brought by Ram Chander Babu Lal was competent under S. 47, Civil P. C. ? As to the first point, the order of the Court passed on 27th March 1939, as observed before, is quite clear. It did not grant any leave to the judgment-debtor to sell the property. In fact, the Court had never even applied its mind to that question. It was contended, however, that the leave might be spelt out of the order passed on 21st April 1939 and my attention was drawn in that connection to O. 21, R. 83, sub-r. (2), Civil P. C. I am unable to infer any leave having been granted to the judgment-debtor *ex post facto* by the order passed on 21st April 1939. I am not prepared to admit that leave could have been granted by

the Court after the sale had been effected by the judgment-debtor without the Court's permission. But conceding, without admitting, that it could have been done I am unable to spell any leave out of the order passed on 21st April 1939 merely because the Court recorded an order on the statement of the parties that a sale had taken place and ordered the sale proceeds to be deposited in Court. As for R. 83, it might be observed that Khem Chand being an assignee of the decree could not have been ordinarily required to deposit the purchase-money under that rule. It seems to me that the Court had never paid any attention to the question as to whether it was required to grant leave to the judgment-debtor to effect the sale privately after 27th March 1939 and had not granted leave to the judgment-debtor, whatever else it might have done, on 27th March 1939. I must, therefore, repel the first contention advanced on behalf of the appellant.

The question regarding the validity of the attachment is slightly more difficult, but definite objections were not raised on behalf of the appellant and, in the absence of such objections, it is not possible for me to entertain the point which was attempted to be made at the hearing before me that the attachment was invalid as the notice of attachment was not affixed, as required by O. 21, R. 54, Civil P. C., on the court house. Had an objection been raised to that effect, the respondents would have had an opportunity to meet it. But this was not done and, in the absence of a definite objection to that effect, I must presume, as was presumed by their Lordships of the Privy Council in 15 Lah. 836,¹ that the attachment was valid and that all necessary steps had been taken which would validate the attachment. It is quite true that although the order of the Court passed on the respondents' application under O. 38, R. 5 was to issue a warrant of attachment before judgment in accordance with law, yet the warrant itself did not call upon the judgment-debtor to furnish security as required by O. 38, R. 5, Civil P. C., and to that extent the warrant was defective. But then that objection could have been raised, as held by a Division Bench of this Court in I.L.R. (1937) Lah. 756,² by the judgment-debtor and not by a third party as the present appellant happens to be. I would, therefore,

1. ('34) 21 A.I.R. 1934 P.C. 217 : 15 Lah. 836 : 61 I.A. 371 : 151 I.C. 221 (P.C.), Mohammad Akbar Khan v. Musharaf Shah.
2. ('38) 25 A.I.R. 1938 Lah. 49 : I.L.R. (1937) Lah. 756 : 175 I.C. 828, Dwarka Das-Badri Das v. Siri Ram.

repel the second contention advanced by learned counsel for the appellant as well.

The third question, however, is far more difficult and in view of divergence of judicial opinion I would like the matter to be decided by a larger Bench. There is a Division Bench ruling of this Court (by which I am bound) which takes the view that such a suit as the present one is barred under S. 47, Civil P. C.: see 6 Lah. 544.³ The other decisions on which reliance was placed by learned counsel for the appellant are: 19 ALL. 332,⁴ 28 Cal. 492,⁵ 56 Mad. 447⁶ and 43 C.W.N. 1091.⁷ Learned counsel for the respondents has, on the other hand, drawn my attention to a Full Bench decision of Madras in I.L.R. (1941) Mad. 438⁸ to which I was a party and in which a contrary view was taken. Another Full Bench ruling in which the same view was taken is reported in 24 Cal. 62.⁹ The other decisions on which reliance was placed by learned counsel for the respondents are: 61 Cal. 1068,¹⁰ 16 ALL. 286,¹¹ A I.R. 1942 Pat. 369¹² and 13 Pat. 735.¹³ In view of this divergence, I would ask my Lord the Chief Justice to place this point for a decision by a larger Bench of this Court.

Opinion of the Full Bench.

Harries C. J.—This is a reference to a Full Bench made by a learned Single Judge hearing Regular Second Appeal No. 1120 of 1943. To appreciate the point in issue, it will be necessary shortly to set out the facts of the case. A firm Messrs. Ram Chander Babu Lal brought a suit in the Court of the Senior Subordinate Judge at Gurgaon claiming Rs. 4256-2-9 from one Mul Chand. This suit was instituted on 6th July 1938, and two days after its institution the plain-

3. ('26) 13 A.I.R. 1926 Lah. 134 : 6 Lah. 544 : 93 I.C. 30, Ishar Das v. Parma Nand.
4. ('97) 19 All. 332, Lalji Mal v. Nand Kishore.
5. ('01) 28 Cal. 492, H. Mathewson v. Gobardhan Tribedi.
6. ('33) 20 A.I.R. 1933 Mad. 166 : 56 Mad. 447 : 141 I. C. 54, Seetharaman Chettiar v. Chidambaram Chettiar.
7. ('39) 43 C.W.N. 1091, Dhirendra Narain Ghose v. Basanta Kumar Dass.
8. ('41) 28 A.I.R. 1941 Mad. 161 : I.L.R. (1941) Mad. 438 : 196 I.C. 204 (F.B.), Annamalai Mudali v. Ramasami.
9. ('97) 24 Cal. 62 (F.B.), Ishan Chunder Sirkar v. Beni Madhub Sirkar.
10. ('34) 21 A.I.R. 1934 Cal. 827 : 61 Cal. 1068 : 153 I. C. 777, Madhusoodan Shaha v. Firm Rampershad Chimanlal.
11. ('94) 16 All. 286, Madho Das v. Ramji Patak.
12. ('42) 29 A.I.R. 1942 Pat. 369 : 201 I. C. 786, Lakhpat Lal v. Makhan Ram.
13. ('34) 21 A.I.R. 1934 Pat. 413 : 13 Pat. 735 : 151 I.C. 683, Gauri Dutt v. D. K. Dowing.

tiff made an application for the attachment of certain property before judgment under O. 38, R. 5, Civil P. C. This application was granted and a warrant for attachment was ordered to be issued as required by law. The attachment was in due course made and it has been held by the learned Single Judge that this attachment made on 8th July 1938, was valid. On 18th February 1939, the firm Ram Chander Babu Lal obtained a decree for about Rs. 3,600.

It appears that one Bir Bhan held another decree against Mul Chand and had apparently attached the same property as that attached before judgment by the firm Ram Chander Babu Lal. On 25th March 1939, Mul Chand in the execution proceedings of Bir Bhan applied to the Court for permission to sell the property in dispute under O. 21, R. 83, Civil P. C. No order appears to have been passed by the Court and the learned Single Judge has held that the sale which eventually took place was not under O. 21, R. 83, Civil P. C., but was a private sale by Mul Chand. This sale actually took place on 3rd April 1939, the property being purchased by one Bhiku Mal who had by that time become the successor-in-interest to Bir Bhan, the decree-holder. The property was actually purchased for a sum of Rs. 400.

On 8th April 1939, the plaintiff firm Ram Chander Babu Lal in execution of their decree for Rs. 3600 applied for the sale of the property attached before judgment. On 27th April 1939, Bhiku Mal, who had purchased the same property in the other execution, filed objections under O. 21, R. 58, Civil P. C. On 28th July 1939, the executing Court allowed the objections of Bhiku Mal whereupon the firm Ram Chander Babu Lal brought the present suit on 26th March 1940, under O. 21, R. 63, Civil P. C., claiming that the property attached was liable to be sold in execution of their decree. The main defence was that no separate suit lay by reason of the provisions of S. 47, Civil P. C. The learned Subordinate Judge who heard the case in the first instance decreed the plaintiffs' suit and an appeal by the defendant to the lower appellate Court was dismissed by the learned District Judge of Hissar. A second appeal was preferred to this Court which was heard by a learned Single Judge. A number of points were taken with which we are not concerned in this reference to the Full Bench. One point taken before the learned Single Judge was whether the suit brought by Ram Chander Babu Lal was competent by reason of S. 47, Civil P. C.

On behalf of the defendant-appellant reliance was placed on the case in 6 Lah. 544.³ On behalf of the plaintiffs it was contended that this case was wrongly decided and reliance was placed on a Full Bench decision of the Madras High Court, I.L.R. (1941) Mad. 438,⁸ to which the learned Single Judge who was then sitting in the High Court of Madras was a party. The learned Single Judge was of opinion that the matter was one of difficulty and importance and accordingly referred the question as to whether in the circumstances a suit would lie for decision by a larger Bench. This Full Bench was constituted and has heard arguments on the point. Section 47, Civil P. C., is in these terms :

"(1) All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the Court executing the decree and not by a separate suit.

(2)

(3) Where a question arises as to whether any person is or is not the representative of a party, such question shall, for the purposes of this section be determined by the Court."

There can be no doubt whatsoever that the question arising in the case, namely, whether the property in dispute was liable to sale in execution of Ram Chander Babu Lal's decree is a question relating to the execution, discharge or satisfaction of that decree. Clearly therefore, S. 47 will apply to this case, if Bhiku Mal the defendant can be described as a representative of the judgment-debtor Mul Chand. The matter was considered by a Bench of this Court in 6 Lah. 544.³ In that case, the respondent Parma Nand obtained a simple money-decree and in execution of that decree sought to have certain land sold which he had attached before judgment. This land was under mortgage to the appellants who maintained that they were purchasers of the equity of redemption after the attachment of the property by the decree-holder. They contended that the attachment was invalid and the land could not be sold in execution. The Subordinate Judge disallowed the claim of the appellants and the question was whether that order was one passed under S. 47, Civil P. C., and open to appeal, or whether it could be set aside only by a regular suit as held by a Single Judge of the High Court. The Bench held that the appellants, as purchasers of the attached property, were representatives of the judgment-debtor as contemplated by S. 47, Civil P. C., and that an appeal against the order of the Subordinate Judge was,

therefore, competent. At p. 546, Sir Shadi Lal C. J., who delivered the judgment of the Bench, observed :

"Now, it has been repeatedly held that the expression 'representative' in S. 47 has a more extended meaning than a 'legal representative' and includes also a representative-in-interest. An assignee from a judgment-debtor of property belonging to him and affected by the decree is a representative of the judgment-debtor within the meaning of the section. Such an assignee stands in the shoes of the judgment-debtor and is bound by the decree so far as the property assigned to him is concerned. He is subject to the same liabilities and is entitled to exercise the same rights as his assignor, the judgment-debtor"

There can be no doubt that a purchaser from the judgment-debtor of his property which is neither under attachment nor otherwise affected by the terms of the decree, cannot be held to be a representative of the judgment-debtor, and the case reported in 64 P. R. 1912,¹⁴ is one of that description.

In the case before us the appellants are purchasers of the *attached* property and we have no hesitation in holding that they are the representatives of the judgment-debtor as contemplated by S. 47, Civil P. C."

If these observations of the learned Chief Justice correctly state the law, then it is clear in this case that a suit would not lie and that the matter should be decided in the execution proceedings under S. 47, Civil P. C. It was, however, contended on behalf of the plaintiff-respondents that this case does not lay down good law and should be overruled. The meaning to be given to the word "representative" in S. 47, Civil P. C., has been the subject of a number of cases in the various High Courts in India. The leading case is a Full Bench decision of five Judges of the Calcutta High Court in 24 Cal. 62.⁹ In that case it was held that the term "representative" as used in S. 244 (now S. 47), Civil P. C., when taken with reference to the judgment-debtor does not mean only his legal representative, that is, his heir, executor or administrator, but it means his representative-in-interest, and includes a purchaser of his interest, who, so far as such interest is concerned, is bound by the decree. The Bench further held that there was no reason for excluding from its signification an execution purchaser of the judgment-debtor's interest. In the present case, the defendant-appellant is not the execution purchaser of the judgment-debtor's interest but, as found by the Single Judge, is a purchaser in a private sale. It would appear, therefore, that this Full Bench decision applies with possibly greater force to facts of the present case which is before the learned Single Judge.

14. ('12) 64 P. R. 1912: 14 I.C. 40, *Mt. Bhamphul Devi v. Harbakhsh Singh*.

A Bench of the Calcutta High Court in 28 Cal. 492⁵ followed the Full Bench case in a case in which the facts were somewhat different. In that case property was attached in execution of a decree against the judgment-debtor and placed in charge of a Receiver appointed by the Court. While the attachment was pending, the judgment-debtor granted a lease of the property to M, who thereupon set up a right to hold possession of the property and to pay to the Receiver only the rent due from him under the lease. It was held that M was a representative of the judgment-debtor within the meaning of S. 244 of the old Code of Civil Procedure, and that a declaration that the lease was invalid and inoperative as against the decree-holder must be sought for under that section and not by a separate suit. A similar view has been taken by the Allahabad High Court. In 19 ALL. 332⁴ a Bench held that the purchaser of property which is under attachment in execution of a decree is a representative of the judgment-debtor under that decree within the meaning of S. 244 of the old Code of Civil Procedure. A similar view was taken by another Bench in 21 ALL. 20,¹⁵ in which it was held that the purchaser of property which is at the time of the purchase under attachment in execution of a decree is a representative of the judgment-debtor vendor within the meaning of S. 244 of the old Code of Civil Procedure. Counsel for the plaintiff-respondents placed reliance upon another earlier Allahabad case: 16 ALL. 286.¹¹ From the headnote of this case, it would appear that the Bench held that a purchaser by private sale of immovable property from a judgment-debtor is not a representative of the judgment-debtor within the meaning of S. 244 of the old Code of Civil Procedure where the decree against the judgment-debtor is a simple money-decree and creates no charge upon specific property. It is clear from the facts of this case that when the property was purchased it was under attachment in execution proceedings and there can be no doubt that the effect of the decision is that even in such a case the purchaser was not a representative-in-interest of the judgment-debtor. It appears, however, from the judgment that the Bench did not intend so to decide the case. At p. 291 Sir John Edge C. J., who was a party to the case in 19 ALL. 332⁴ to which I have made reference, observed :

In our opinion it would be stretching S. 244 too far to hold that that section included in an appli-

15. ('99) 21 All. 20, *Gur Prasad v. Ram Lal*.

cation for execution of a simple money-decree a person who had purchased from the judgment-debtor property against which the decree was sought to be executed, but which was not affected by the decree itself and would not be affected until an order for attachment of an order for sale in execution of the decree was made."

This observation suggests that had the learned Judges realised that the property was under attachment they would have held the purchaser to be a representative of the judgment-debtor. It is I think clear from the observations in 21 ALL. 20¹⁵ that the learned Judges who decided 16 ALL. 286¹¹ had overlooked the fact that the property in that case was under attachment. At page 21 the learned Judges who decided 21 ALL. 20¹⁵ observed :

"Are the plaintiffs as purchasers representatives of the judgment-debtor so as to fall within the category of persons specified in S. 244 of the Code of Civil Procedure? Two cases have been cited to us which are in apparent contradiction. The first is the case in 16 All. 286¹¹ and the other is 19 All. 332.⁴ The first was decided by the late Chief Justice and our brother Banerji, the second by the late Chief Justice and one of us. In the former case it was found as one of the facts that there was a subsisting attachment at the time of purchase, though no mention of such attachment is made in the rest of the judgment. We have consulted one of the Judges who decided that case, and he having perused it, informs us that in the course of the delivery of the judgment the fact of the existence of that attachment was not present to the mind of the Court. We see no reason to depart from the ruling in the latter case, which we believe to be sound and in accordance with the drift of the decisions of this Court."

It is clear from these observations that on its facts the case in 16 ALL. 286¹¹ was wrongly decided and it was so decided because the learned Judges who delivered the judgment overlooked the fact that the property was under attachment and went on to decide the case as if no such attachment existed. That being so, the case in 16 ALL. 286¹¹ is not an authority for the proposition that a purchaser of property under attachment is not a representative of the judgment-debtor. The same view has been taken in a number of cases of the Madras High Court. See 20 Mad. 378,¹⁶ 34 Mad. 450¹⁷ and 56 Mad. 447.⁶ This last case is practically on all fours with the case before the learned Single Judge. The facts were that the appellant, who had attached before judgment the immovable property of his judgment-debtor, filed, after obtaining a decree in his suit, an execution petition for the purpose of bringing the attached property to sale. The res-

pondent was a purchaser of the same property from one M, who had in the meantime, but subsequent to the attachment before judgment, filed a suit against the same judgment-debtor and purchased the property in execution of the decree therein. The respondent intervened in the execution petition filed by the appellant and filed an execution application asserting his right to the property and resisting the execution of the appellant's decree. The appellant urged that the decree obtained by M was fraudulent and collusive, that the respondent was a *benamidar* for the judgment-debtor and that in point of fact the property in question continued to be in the possession of the latter. The Court below allowed the respondent to intervene in the execution petition filed by the appellant, but without deciding the question raised by the appellant referred him to a regular suit for the purpose of getting rid of the decree obtained by M and the sale held in pursuance of it. It was held that the respondent was the representative of the judgment-debtor and that, as the question was one relating to the execution of the appellant's decree, the respondent had properly been allowed to intervene under S. 47, Civil P. C., in the appellant's execution petition. It was further held that the Court below ought to have decided the question raised by the appellant in execution under S. 47 and ought not to have referred him to a regular suit for the purpose. Once it was held that resort to S. 47 was the proper remedy, the Court had no option but had to decide the question in execution under that section. The only material difference in fact between this Madras case and the present case is that the purchase subsequent to the attachment was as a result of the sale in execution and not as a result of a private sale.

It will be seen, therefore, that there is a great body of authority in support of the view which is expressed by a Bench of this Court in 6 Lah. 544.³ It was, however, urged before the learned Single Judge that a recent Full Bench decision of the Madras High Court, I.L.R. (1941) Mad. 438,⁸ threw considerable doubt on the correctness of this body of authority. In this Madras case certain immovable property of the judgment-debtor was attached on 18th September 1921, in execution of a money-decree. The widow of the judgment-debtor sold the property to the defendants by a private sale on 26th September 1921. The property was subsequently sold on 7th January 1922, in execution proceedings and the plaintiff, a stranger, became

16. (97) 20 Mad. 378, *Parmananda Das v. Mahabbeer Dossji*.

17. (10) 34 Mad. 450 : 7 I. C. 418, *Kupppana Kaundan v. Kumara Kaundan*.

the auction-purchaser. On 1st March 1932, the plaintiff filed a suit for recovery of possession of the property from the defendants. On behalf of the latter, it was contended that the suit was barred by reason of S. 47, Civil P. C. The Full Bench, however, held that a stranger who purchased property at a court-auction held in execution of a money-decree was not entitled to apply for possession as against the judgment-debtor or his representative-in-interest under S. 47, Civil P. C. Where the judgment-debtor or any one at his instigation resists or obstructs the auction-purchaser, the latter must proceed in accordance with the provisions of O. 21, R. 97, Civil P. C. It was further held that S. 47, Civil P. C., did not apply to a case where the dispute arose between a party and his own representative or between two persons who both represented the same party and the aggrieved party's remedy in such a case was by way of suit. It was further held by four of the Judges (Patanjali Sastri J. dissenting) that the stranger auction-purchaser was the representative of the judgment-debtor. It appears to me that there is no conflict between this Full Bench case and the line of authorities to which I have already made reference. In fact the majority of the Full Bench held that a stranger auction-purchaser was the representative of the judgment-debtor. The reason why the Full Bench held in that case that a suit lay and that proceedings under S. 47, Civil P. C., were not competent was that the dispute was between the representatives of the judgment-debtor. In the view of the Full Bench S. 47 applied only to disputes between the decree-holder or his representatives on the one hand and the judgment-debtor or his representatives on the other. Where the contestants were the representatives of the same person, S. 47, Civil P. C., had no application. The point decided in that case was very different from the point now before us and, in my judgment, this Madras Full Bench decision so far from throwing any doubt on the correctness of the decision of the cases to which I have referred actually supports the decisions in those cases.

A reference was also made by counsel for the plaintiff-respondents to a Bench decision of the Patna High Court: 13 Pat. 735.¹³ It is clear in that case that the purchaser from the judgment-debtor was not a person affected by the decree. If he had been it is clear that the case would have been decided the other way. The actual decision of the Court was that a purchaser from the judgment-

debtor *pendente lite* could not be regarded as a representative of the judgment-debtor, within the meaning of S. 47, Civil P. C., if it could not be said that for the purpose of the execution proceedings he was affected by the decree and stood in the shoes of the judgment-debtor. As I have already stated, a person who purchases property whilst it is under attachment does for the purposes of the execution proceedings stand in the shoes of the judgment-debtor and is, therefore, his representative. Reliance was also placed on behalf of the respondents on the case in 64 P. R. 1912.¹⁴ In that case a judgment-debtor under a money-decree transferred the whole of his property to his wife whilst an application for execution was pending. It was held that a suit by the decree-holder to have the gift declared void was not barred by S. 47, Civil P. C., the donee not being a representative of the judgment-debtor within the meaning of that section. It is, however, clear from the facts of this case that the property when it was transferred by the judgment-debtor to his wife was not under attachment. Had it been under attachment different considerations would have arisen. The case, therefore, in no way assists the respondents.

Lastly, reference was made by counsel for respondents to a very recent Bench decision of this Court: A. I. R. 1944 Lah. 294.¹⁸ This case again affords the respondents no assistance because the question involved was whether a dispute between a party and his own representatives or between parties not opposed to one another in the suit was within the ambit of S. 47, Civil P. C. The Bench came to the same conclusion as the Full Bench in the Madras case to which I have made reference. They held that S. 47 does not apply where the dispute is between two representatives of the judgment-debtor or between the judgment-debtor and his representative. The dispute, as I have said, must be between the decree-holder or his representatives on the one hand, and the judgment-debtor or his representatives on the other. It will be seen, therefore, that there is no case in which it has been held that a purchaser in the circumstances existing in the present case is not a representative of the judgment-debtor. The authority in favour of holding that the purchaser in the present case is a representative of the judgment-debtor is overwhelming and I

18. ('44) 31 A. I. R. 1944 Lah. 294; I.L.R. (1944) Lah. 479 : 215 I. C. 276 (F.B.), *Surindar Nath v. Ram Sarup*.

would, therefore, hold that in the present case the purchaser Bhiku Mal, the present defendant, is a representative of the judgment-debtor Mul Chand. That being so, I would answer the learned Single Judge's question by stating that a suit is not competent by reason of S. 47, Civil P. C., subject always to the learned Single Judge's decision on the point which I will now discuss.

It was urged on behalf of the plaintiff-respondents that the defendant-appellant was estopped from contending that no suit lay. The defendant-appellant had himself preferred objections under O. 21, R. 58, Civil P. C., and as these objections were allowed it was urged that the plaintiff was bound to bring a suit within a year under the provisions of O. 21, R. 63, Civil P. C. That being so, it was contended that it was no longer open to the defendant-appellant to urge that no suit lay. This point has not been referred to us by the learned Single Judge and, therefore, the Bench expresses no opinion upon it. I merely content myself with saying that this point can doubtless be urged when the case again comes before the Single Judge who will deal with the point upon its merits, if it is open to the plaintiff-respondents at this stage to take it. Let the record be returned to the learned Single Judge who will now dispose of the case in the light of the answer given in this judgment.

Abdul Rashid J. — I agree.

Achhru Ram J. — I agree.

[After the Full Bench had answered the reference and returned the record, *Abdur Rahman J.* delivered the following judgment on 18th December 1945.]

Judgment. — The reference has been answered by the Full Bench and it has been held that the suit filed by the respondent was barred by S. 47, Civil P. C. Learned counsel for the respondent contends in the first instance that the other party should be held to be estopped from raising the objection in regard to the maintainability of the suit as, (1) he had himself raised objection to the sale under O. 21, R. 58, Civil P. C., as a third party and not as a representative of the judgment-debtor under S. 47, Civil P. C., and (2) as he had merely relied on the sale having been effected in his favour on 3rd July 1939 and had not stated in the objection proceedings that he had secured attachment before judgment in July 1938. No question of estoppel which is after all a question of fact or in any case a mixed question of fact

and law had ever been raised on behalf of the respondent up till now and I cannot permit a fresh objection like this to be raised at this stage. Moreover, there can be no estoppel simply because the appellant had while raising objections merely quoted O. 21, R. 58 when he should have quoted S. 47 at the time when he took the objection. Nor can the appellant be held to have been estopped on account of his omission to state in his objections that the property had been attached before judgment in July 1938. Learned counsel for the respondent relied on a decision in A. I. R. 1925 ALL. 240¹⁹ but that has no application as in that case the execution Court had directed a party to bring a civil suit and the learned Judges held that if the party had appealed in spite of that order, his appeal would have been rejected on the ground that it was not competent. The present case is very different. Here, the objections were allowed by the execution Court and there was no reference by that Court to either of the parties to file a civil suit.

The second contention advanced by learned counsel for the respondent was that the suit out of which the present appeal has arisen may be allowed to be converted into execution proceedings under S. 47, Civil P. C. This cannot be done as the Court before which the suit was instituted was different from the execution Court and could not decide the matter on the execution side. The objections were allowed by the Senior Subordinate Judge before whom the execution was pending while the suit was heard and decided by the Court of a Subordinate Judge of the 4th class. Learned counsel for the respondent, however, urged that inasmuch as the appellate Court was in either case the same i. e., the District Judge, Hissar, the appeal to him from the decree of the Subordinate Judge of the 4th class may be permitted to be converted into an appeal from the order of the Senior Subordinate Judge allowing objections in execution proceedings. But that is not possible. I cannot convert an appeal from a decree of the Subordinate Judge of the 4th class into one from an order passed in execution proceedings by a different Court (Senior Subordinate Judge) on 28th July 1939. Moreover, as pointed out by learned counsel for the appellant, the appeal to the District Judge was filed by the present appellant against whom the suit was decreed by the trial Court and not by the respondent. The

19. (25) 12 A.I.R. 1925 All. 240 : 86 I. C. 323, *Mathura Das v. Ram Raj Singh*.

respondent cannot, therefore, ask for an appeal by the opposite party to be converted into an appeal by him against whom the order was passed in execution proceedings. For the above reasons, I must allow the appeal, set aside the judgments of both the Courts below and dismiss the plaintiff's suit. But in the circumstances of the case I would leave the parties to bear their own costs throughout.

G.B./D.H.

Appeal allowed.

[Case No. 31.]

A. I. R. (33) 1946 Lahore 142**FULL BENCH****DIN MOHAMMAD, TEJA SINGH AND
ACHHRU RAM JJ.***Mt. Sant Kaur — Petitioner*

v.

*Teja Singh, Plaintiff and others,
Defendants — Respondents.*

Civil Revn. Nos. 332 and 333 of 1944, Decided on 1st June 1945, from judgment of Din Mohammad J., D/- 21st March 1945.

(a) Pre-emption — Suit for — Doctrine of *lis pendens* — Applicability of — Pending suit vendee transferring property sought to be pre-empted to A having superior right of pre-emption—Right to enforce pre-emption barred at time of transfer — Doctrine of *lis pendens* applies — A is not entitled to be impleaded as party to suit so as to defeat plaintiff's right of pre-emption.

The doctrine of *lis pendens* applies to pre-emption suits. Where during the pendency of a suit for pre-emption and before the expiry of limitation for instituting a suit for pre-emption the vendee transfers the property sought to be pre-empted in favour of A in recognition of his right of pre-emption and in recognition of his right to enforce that right by means of legal action the transfer by the vendee to A cannot be regarded as voluntary so as to attract the rule of *lis pendens*. In such a case, A must be regarded as having simply been substituted for the vendee in the original bargain of sale and he can defend the suit on all pleas which he could have taken had the sale been initially in his own favour. But where at the time of transfer to A, limitation for instituting a suit for pre-emption had expired and A had lost the use of the coercive machinery of law for compelling the vendee to surrender the property in recognition of his right of pre-emption the transfer in favour of A by the vendee must be regarded as a voluntary transfer of such title as the vendee himself had acquired under the original sale so as to attract the principle of *lis pendens*. In such a case the transfer has not the effect of substituting the subsequent transferee A in place of the vendee in the original bargain. He cannot be regarded as anything other than a representative-in-interest of the original vendee, having no right to defend the suit except on the pleas that were open to such vendee himself and hence cannot plead his own equal or superior right of pre-emption and defeat the plaintiff's right to pre-empt. [P 143 C 2; P 144 C 1; P 145 C 2]

Therefore a sale by a vendee in favour of a superior pre-emptor during the pendency of a suit for pre-emption but after the expiry of the period of limitation for a suit for pre-emption does not entitle the subsequent transferee to be impleaded as a party to the suit so as to be able to defeat the right of pre-emption claimed by the plaintiff. The fact that the subsequent transferee has, as a result of the sale in his favour, obtained possession of the property in suit is immaterial: *Case law considered*. [P 143 C 2; P 144 C 1; P 145 C 2; P 146 C 1]

(b) Civil P. C. (1908), Ss. 47 and 146—Word “representative” in S. 47 — Meaning of — Transferee from defendant *pendente lite* is representative of defendant within S. 47 — Decree-holder can execute decree in same manner and to same extent as against defendant (Per Achhru Ram J.).

The word “representative” as used in S. 47 has a much wider meaning than the words “legal representative” and includes not only a legal representative but any representative-in-interest, i. e. any transferee of the interest of a party, whether by assignment, succession or otherwise, who so far as such interest is concerned is bound by the decree. A transferee from a defendant *pendente lite* being the representative-in-interest of such defendant and being bound by the decree eventually passed in the suit, by reason of the operation of the rule of *lis pendens*, is a representative of the defendant within S. 47 and the decree-holder can execute the decree against him in the same manner and to the same extent as he could execute it against the original defendant: (‘46) 33 A. I. R. 1946 Lah. 134 (F.B.), *Rel. on*. [P 146 C 1]

C. P. C. —

(‘44) Chitaley, S. 47, N. 17, Pts. 1 to 4, 7; S. 146, N. 8.

(‘41) Mulla, Page 185, Pts. (c), (d), (k), (l), (m), (n).

*D. R. Sawhney — for Petitioner.**Amar Nath Monga and Dewan Mehr Chand —
for Respondents.***ORDER OF REFERENCE.**

Din Mohammad J. — This order will cover C. R. No. 332 and C. R. No. 333 of 1944. The questions involved in both these are identical, viz., (1) Whether a sale by a vendee in favour of a superior pre-emptor during the pendency of a suit for pre-emption but after the expiry of the period of limitation entitles the subsequent transferee to be impleaded as a party to the suit so as to be able to defeat the right of pre-emption claimed by the plaintiff? (2) Whether the fact that the subsequent transferee has, as a result of the sale in his favour, obtained possession of the property in suit is, in any way material to the consideration of this matter? In A. I. R. 1935 Lah. 808,¹ as a member of a Bench of this Court, I was responsible for making certain observations directly touching the principal point at issue, but in a

1. (‘35) 22 A. I. R. 1935 Lah. 808 : 160 I. C. 349, *Jus Rai Juniwal v. Gokal Chand Jaini*.

later case, reported as I. L. R. (1942) Lah. 190,² which came before a Full Bench, it was argued that those observations required further consideration. The Full Bench, however, refrained from expressing any opinion thereon as it was thought that the question did not directly arise in the case and that any remarks made by the Bench would be mere *obiter dicta*. The questions are important and generally arise in pre-emption suits. I accordingly forward these cases to the Honourable the Chief Justice with a recommendation that the two questions set forth above may be decided by a Full Bench.

Opinion of the Full Bench.

Achhru Ram J.—On 22nd October 1942, Jagir Singh defendant in the suits which have given rise to these two petitions for revision sold the suit land to Kala Singh, another defendant in the said suits. Two suits were brought to pre-empt this sale on 21st October 1943, one by Teja Singh and another by Labh Singh, each of them being cross impleaded in the suit of the other plaintiff. While the two suits were pending, Kala Singh sold a portion of the land purchased by him to one Sadhu Singh an Indian soldier serving under special conditions, by means of a sale-deed dated 26th October 1943. On 15th December 1943, Kala Singh sold the rest of the land purchased by him to Mt. Sant Kaur widow of Ujjagar Singh, a collateral of the vendor, the sale-deed reciting that the land had been transferred to her in recognition of her superior right of pre-emption. On 21st December 1943, Mt. Sant Kaur applied to the Court to be added as a defendant in both the suits. Her applications were dismissed on 10th April 1944, on the ground that she would be bound by the decrees passed in the suits of Teja Singh and Labh Singh, without having been impleaded as a defendant thereto, by reason of the operation of the rule of *lis pendens*. Mt. Sant Kaur filed these two petitions for revision of the orders passed in the two suits rejecting her applications to be impleaded as a defendant. My brother Din Mohammad who heard the two petitions in Chambers has referred the following two questions to a Full Bench :

(1) Whether a sale by a vendee in favour of a superior pre-emptor during the pendency of a suit for pre-emption but after the expiry of the period of limitation entitles the subsequent transferee to be impleaded as a party to the suit so as to be able to defeat the right of pre-emption claimed by the plaintiff ?

2. (41) 28 A. I. R. 1941 Lah. 444 : I. L. R. (1942) Lah. 190 : 197 I. C. 263 (F. B.), *Ali Mohamed v. Mahomed Din*.

(2) Whether the fact that the subsequent transferee has, as a result of the sale in his favour, obtained possession of the property in suit is in any way material to the consideration of this matter ?

The answer to both these questions, in my view, depends on the answer to the question whether the rule of *lis pendens* hits the subsequent transfer visualized therein. The rule, as stated in the leading English case in (1857) 44 E. R. 842,³ is that the law does not allow litigant parties pending the litigation to transfer their rights to the property in dispute so as to prejudice the opposite party. In this country the rule has received legislative recognition in S. 52, T. P. Act, which reads as follows :

"During the pendency in any Court having authority in British India, or established beyond the limits of British India by the Governor-General in Council, of any suit or proceeding which is not collusive and in which any right to immovable property is directly and specifically in question, the property cannot be transferred or otherwise dealt with by any party to the suit or proceeding so as to affect the rights of any other party thereto under any decree or order which may be made therein, except under the authority of the Court, and on such terms as it may impose."

The logical effect of the rule as enunciated in (1857) 44 E. R. 842³ and in the aforesaid section of the Transfer of Property Act is that the transferee *pendente lite* is bound by the result of the suit even though he is not impleaded as a party thereto and had even no notice thereof. A suit for pre-emption being a suit to enforce a right to purchase immovable property in preference to the actual purchaser and to have, by enforcement of that right, the plaintiff substituted for such purchaser in the ownership of that property, there can be no reason why the rule of *lis pendens* should not apply to a transfer of such property by the defendant *pendente lite*. All the reported cases in this Court as well as elsewhere have consistently taken the view that the rule does apply to such suits. So far as this Court is concerned the matter is concluded by a Full Bench judgment in 11 Lah. 258.⁴ Indeed, Mr. Sawhney who argued the case on behalf of the petitioners did not question the applicability of the rule of *lis pendens* to pre-emption suits. An exception has, however, been made in the above mentioned Full Bench judgment, and some other cases, in favour of a sale to a person with a right of pre-emption, either equal or superior to that of the plaintiff, in recognition of such right. The

3. (1857) 44 E. R. 842 : 26 L. J. Ch. 797 : W. R. 1, *Bellamy v. Sabine*.

4. (30) 17 A. I. R. 1930 Lah. 356 : 11 Lah. 258 : 132 I. C. 369 (F.B.), *Mool Chand v. Ganga Jal*.

reason for this exception is thus stated in 26 P. R. 1908⁵ at p. 145 :

"Put broadly and briefly the doctrine of *lis pendens* forbids creation of new rights over property already the subject of suit *pendente lite* which are calculated to injure the rights of the claimant. It does not, and if we consider for a moment, we see that it could not, apply to the assertion of rights which existed prior to the institution of the pending suit. . . . It has been clearly laid down that a pre-emptor is in no worse position when asserting his right privately than when he asserts it by suit: 138 P. R. 1884,⁶ 73 P. R. 1898⁷ and 20 All. 100.⁸"

Then with reference to the facts of the particular case the learned Judges observed:

"There the appellant asserts his right not only privately but by suit, and that suit was compromised in his favour so that he allowed it to be dismissed in default. No doubt he gets no further rights as against the respondent by the deed of sale *per se*, but he can maintain that sale if he can prove a pre-existent right to have it executed in his favour. So far only does the doctrine of *lis pendens* apply that the sale could create no new right in his favour having its birth subsequent to the suits of the respondent, but obviously he is not debarred from asserting any pre-existent right he may have had against the vendor and the vendee by the mere fact that some one else had brought a claim against them in reference to the same property.

The law of *lis pendens* is laid down in (1857) 44 E. R. 842³ briefly thus. It affects him (i. e. the subsequent purchaser) because the law does not allow to litigate parties and give to them pending the litigation rights in the property in dispute so as to prejudice the opposite party. In claims for pre-emption the right of any particular claimant is not prejudiced, *qua* own right by the assertion by another claimant of his own pre-existing rights."

In 30 P. R. 1911,⁹ Johnstone and Chevis JJ., in defining the scope of this exception, held that the exception in favour of the transferee having an equal or superior right of pre-emption would not avail a transferee whose suit to enforce such right had already become barred by limitation at the time of the transfer. The reason for thus limiting the scope of this exception was stated to be that the transfer to a person who could no longer enforce his right of pre-emption by means of a suit could only be regarded as a voluntary one and not as a transaction in which he was enforcing his right of pre-emption. The same view of law was taken by Campbell J. in A.I.R. 1925 Lah. 614¹⁰ and

by Martineau J., in 69 I. C. 409.¹¹ In Allaha-bad in 36 ALL. 60,¹² Sir Henry Richards, Knight, C. J., and Tudball J. arrived at the same conclusion. In 61 I. C. 34,¹³ another Bench of the same Court of which Tudball J., was a member re-affirmed this view. In A. I. R. 1935 Lah. 808,¹ a case decided by Addison and Din Mohammad JJ., my brother Din Mohammad who wrote the judgment of the Division Bench gave expression to a similar opinion although the appeal was actually disposed of on other grounds.

In Regular First Appeal No. 63 of 1941 another Division Bench of this Court, consisting of Dalip Singh and Beckett JJ., had to deal directly with this question. In that case, during the pendency of the suit for pre-emption in respect of the sale of a residential house, and after the expiration of the period of limitation for a pre-emption suit, the vendee re-transferred the property purchased by him to a person claiming to have a right of pre-emption equal to that of the original plaintiff, and, on an application made by the plaintiff, the subsequent vendee was added as a party to the suit. The suit was decreed by the Court of first instance and the subsequent vendee appealed to this Court. In appeal it was contended on his behalf that the subsequent vendee, even though the transfer in his favour had been made at a time when he could not have brought a suit to enforce his own right of pre-emption, could defeat the plaintiff's suit inasmuch as the latter was bound to prove that he had a better title than the defendant at the time of the decree. It was further contended, that even though he could not sue to enforce his pre-emptive right by reason of lapse of time, he could successfully resist the plaintiff's suit on the strength of that pre-emptive right, the law of limitation having no application to defendant's pleas and being confined in its operation, unless the provisions of S. 28, Limitation Act were shown to be applicable, only to a plaintiff's suit. It was also contended that S. 28 of the Act did not in terms apply to a pre-emption suit. These are also substantially the arguments put forward on behalf of the petitioners in the present petitions. In dealing with these contentions Dalip Singh J. observed as follows:

"As I look at the matter, the doctrine of *lis pendens* would certainly apply in favour of the

5. ('08) 26 P. R. 1908, Mahmud Khan v. Khuda Bakhsh.

6. ('84) 138 P. R. 1884, Amirullah Shah v. Tabe Hussain.

7. ('98) 73 P. R. 1898, Mahtab-ud-Din v. Karam Elahi.

8. ('98) 20 All. 100, Seri Mal v. Hukam Singh.

9. ('11) 30 P.R. 1911 : 10 I.C. 1007, Karam Ali v. Sultan.

10. ('25) 12 A. I. R. 1925 Lah. 614 : 89 I. C. 170, Jan Muhammad v. Nasir Khan.

11. ('23) 10 A. I. R. 1923 Lah. 31 : 69 I. C. 409, Dharam Singh v. Kirpal Singh.

12. ('14) 1 A. I. R. 1914 All. 356 : 36 All. 60 : 22 I. C. 266, Kamta Prasad v. Ram Jag.

13. ('21) 8 A.I.R. 1921 All. 105 : 61 I. C. 34, Asa Singh v. Naubat.

pre-emptor as against a second vendee who had not acquired the property in exercise of any superior right of pre-emption but had acquired it merely in the course of transactions from the original vendee. The learned counsel for the appellants appears to contend that no matter how the second vendee has acquired the property, once he has so acquired it, whether during the pendency of the suit or not, he can defeat the pre-emptive suit on the short ground that his right to pre-empt the property sold was equal to or superior to the right of the pre-emptor but this appears to me to confuse the right of pre-emption with a title paramount and the two things are by no means the same. A right of pre-emption is not a right in the property and no question, therefore, of title paramount arises. It is true that had the second vendee substituted himself for the first vendee by the first vendee recognizing his superior right of pre-emption then whether this was in a suit or by private arrangement the decisions of this Court hold that he can defeat the pre-emptor's right but I am not aware of any case in which it has been held that quite apart from acquiring the property in the exercise of the right of pre-emption, the mere fact that he could have so acquired it is sufficient to defeat the pre-emptor's suit. To give a simple illustration, if A sells property to B and the property is found in possession of C, C can defeat a suit brought by any pre-emptor of the sale by A to B by pleading that B had given up the property to him in recognition of his superior right of pre-emption. This is but logical when one considers that C might have brought a suit within the period of limitation, the two suits of A and C would then have been tried together and if C had a superior right of pre-emption to A, A's suit could only be decreed subject to the rights of C to pre-empt the property. If C has already pre-empted the property without a suit brought by the acquiescence of B, it would be extraordinary that A's suit against B should then succeed without a reference to the rights of C. But no such question arises when C has not acquired the property in the exercise of the right of pre-emption, but has acquired it from B as the owner of the property. In such a case *ipso facto* it appears to me that C has recognized the title of B, in other words, has recognized the sale by A to B and therefore, has not exercised his right of pre-emption and may be taken to have waived it. If the transaction has taken place during the pendency of the suit of the pre-emptor to pre-empt the sale by A to B, then I am unable to see why the doctrine of *lis pendens* should not apply to the case and A's suit must succeed even as against C, though had C exercised his right of pre-emption the matter might have been otherwise. From this way of looking at the matter, it becomes quite unnecessary to consider whether the right of pre-emption is or is not lost by the expiry of one year or whether the position of the vendee improving his position during suit is in logic identical with the position of a second vendee acquiring the property with a superior right of pre-emption to the pre-emptor."

The following observations made by Beckett J. in dealing with the same matter may also be quoted with advantage:

"The reason given in A. I. R. 1935 Lah. 801¹ was that the doctrine of *lis pendens* would still apply, and this appears to be in accordance with the rule as stated in the leading English case in (1857) 44 E. R. 842³ that the law does not allow

litigant parties pending the litigation to transfer their rights to the property in dispute so as to prejudice the opposite party. It seems clear to me that the rule would be infringed by recognizing the second transfer in the present suit whether or not the right of pre-emption remains alive for bringing a suit after the period of limitation to enforce it has expired. The fact remains that the additional defendants could not have brought a suit to enforce it and the effect of transferring the property in suit during the litigation would be to destroy the claim of the plaintiff pre-emptor altogether, if it could be recognised as a defence. This is a fact which arises directly out of the transfer itself and not out of the right which originally existed."

The reason for not applying the rule of *lis pendens* to the case of a subsequent transferee who himself had a right of pre-emption either equal or superior to that of the plaintiff is that if he had brought a suit to enforce his pre-emptive right, even though subsequent to the institution of the suit by the plaintiff, his right to get a decree and to acquire the property on due compliance with the terms of the decree could not be affected by the fact of the plaintiff having instituted his suit earlier, and there is no reason why he should be placed in a worse position if without the necessity of a suit the original vendee is prepared to admit his claim and to agree to his substitution for himself in the original bargain. Where the subsequent vendee has still the means of coercing, by means of legal action, the original vendee into surrendering the bargain in his favour, a surrender as a result of a private treaty, and out of Court, in recognition of the right to compel such surrender by means of a suit cannot properly be regarded as a voluntary transfer so as to attract the application of the rule of *lis pendens*. The correct way to look at the matter, in a case of this kind, is to regard the subsequent transferee as having simply been substituted for the vendee in the original bargain of sale. He can defend the suit on all the pleas which he could have taken had the sale been initially in his own favour.

However, where the subsequent transferee has lost the means of making use of the coercive machinery of the law to compel the vendee to surrender the original bargain to him, a re-transfer of the property in the former's favour cannot be looked upon as anything more than a voluntary transfer in the former's favour of such title as he had himself acquired under the original sale. Such transfer has not the effect of substituting the subsequent transferee in place of the vendee in the original bargain. Such a transferee takes the property only subject to

the result of the suit. Even if he is impleaded as a defendant in such suit, he cannot be regarded as anything other than a representative-in-interest of the original vendee, having no right to defend the suit except on the pleas that were open to such vendee himself. He not being entitled to be regarded as a party to the original sale, which is being pre-empted, it is not against him but against the original vendee, through and under whom he claims, that the pre-emptor has, in order to succeed, to prove a superior pre-emptive right. The comparison, even at the date of the decree, has to be between the status of the plaintiff and that of the original vendee and not between that of the plaintiff and the subsequent transferee. It is thus obvious that it can make no real difference to the position of such transferee if he is impleaded as a party to the pre-emption suit pending which the property in suit has been transferred to him. Even on being so impleaded, he will not have any right to defeat the suit by reason of his own qualifications which gave him an equal or better right of pre-emption *qua* the original sale. If the plaintiff's right of pre-emption is found to be superior to that of the original vendee at all the material times, the circumstance that by the time the suit comes up for final decision, but subsequent to the institution of the suit and after the expiration of the period of limitation prescribed for a suit to enforce a right of pre-emption, the property has changed hands by reason of a re-transfer by the vendee will not affect his right to a decree of his claim irrespective altogether of the qualification possessed by the subsequent transferee who cannot defeat the plaintiff's suit on the ground of his own pre-emptive right in respect of the original sale being equal or superior to that of the former.

For the above reasons, I would answer the first question referred to the Full Bench in the negative. The answer to the second question follows as a necessary corollary and must also be in the negative. The subsequent transferee cannot by virtue of the transfer *pendente lite* acquire any title to the suit property capable of affecting, in any manner, the rights of the plaintiff. It can make no difference to the operation of the rule of *lis pendens*, which is responsible for this being the legal position of the subsequent transferee, that such transferee has entered into possession of the property in pursuance of the transfer. His possession of the property, as against the plaintiff, can only be regarded as held without any title.

By the re-sale in his favour he does not acquire any title which he may plead in bar of the pre-emption suit already pending, and the possession being of quite recent origin cannot by itself confer on him any title on the strength whereof, quite independently of the re-sale, he may successfully resist the suit. Whether the plaintiff will, in such a case, be able to dispossess the subsequent transferee in execution proceedings, even though he has not been impleaded as a party to the suit culminating in the decree, is a question on which we are not called upon to express any opinion in this case. However, if I had to answer this question I should feel no hesitation in holding that he should be able to do so. Section 146, Civil P. C., expressly provides that where any proceeding may be taken or application may be made by or against any person, the proceeding may be taken or the application may be made by or against any person claiming under him. Section 47 provides for all questions, arising not only between the parties to the suit in which the decree was passed but also between the representatives of such parties, or between one of the parties and the representatives of the other party, and relating to the execution, discharge or satisfaction of the decree, being determined by the Court executing the decree.

There is abundant authority for the view that the word "representative" as used in this section has a much wider meaning than the words "legal representative" and includes not only a legal representative but any representative-in-interest, i. e., any transferee of the interest of a party, whether by assignment, succession or otherwise, who so far as such interest is concerned is bound by the decree. A Full Bench of this Court had, quite recently, in Regular Second Appeal No. 1120 of 1943,¹⁴ to deal with the question of the interpretation of this section and fully endorsed this view. A transferee from a defendant *pendente lite* being the representative-in-interest of such defendant and being bound by the decree eventually passed in the suit, by reason of the operation of the rule of *lis pendens*, there does not appear to be any reasonable doubt as to the decree-holder's right to execute the decree against him in the same manner and to the same extent as he could execute it against the original defendant. Be that as it may, even if it will not be possible for the decree-holder in the pre-emption suit to dispossess

14. Reported in ('46) 33 A. I. R. 1946 Lah. 134 (F.B.), Bhikmal v. Firm Ramchandrar Babu Lal.

the subsequent transferee in execution proceedings and he will have to bring a regular suit for the purpose, for obvious reasons such transferee will not be able to resist the suit on the ground that he himself had a better right of pre-emption in respect of the sale successfully pre-empted by the decree-holder and a decree for his dispossession will follow as a matter of course on the ground of his possession being without any lawful title whatsoever. A more cautious pre-emptor may even implead him in the original suit on being made aware of the transfer in his favour. However, on being so impleaded he will, as explained above, be limited only to the defences available to the original vendee and will not be entitled to resist the suit on the strength of his own superior right which he might have exercised but did not exercise.

Din Mohammad J.—I agree that both questions be answered in the negative.

Teja Singh J. — So do I.

G.N./D.H. *Answer in the negative.*

[Case No. 32.]

*** A. I. R. (33) 1946 Lahore 147**

FULL BENCH

DIN MOHAMMAD, SALE, MUNIR,
MAHAJAN AND KHOSLA JJ.

Commissioner of Income-tax, Punjab
& N. W. F. Provinces, Lahore

— Petitioner

v.

Saran Singh Ram Singh

— Respondent.

Civil Ref. No. 17 of 1943, Decided on 17th December 1945, referred by Harries C. J., Din Mohammad and Sale JJ., D/- 22nd February 1945.

*** (a) Income-tax Act (1922), Ss. 25A (2) and S. 25 (2), (3), (4) — Application of S. 25A (2) is no bar to assessee's claim under S. 25 (4).**

The assessee was a Hindu undivided family consisting of three members, namely, A and his sons B and C. The family carried on certain businesses. Up to the year of assessment 1940-41 the family was assessed as undivided but in the course of the assessment for the year 1941-42 the family submitted an application under S. 25A and claimed that a partition had taken place among the members of the family and all the joint property divided between the father and the sons on 25th March 1941. Of the businesses, the business which fell to the share of C was an old business on which tax had been charged under the Income-tax Act 1918. The Income-tax Officer after the necessary enquiry recorded an order under S. 25A (1) recognising that the family had partitioned its property on 25th March 1941, and made assessment on the members of the family under S. 25A (2). The family claimed that since the business which fell to C's share had been assessed to income-tax under the Act of 1918, it was, under S. 25 (3), not liable

to pay any tax on the income from 18th April 1940 to 25th March 1941 i. e., from the date of commencement of the previous year to the date of discontinuance of the business. The Income-tax Officer rejected the claim holding that the business had neither been discontinued within the meaning of S. 25 (3) nor succeeded within the meaning of Section 25 (4) :

Held (Per Division Bench) — (i) that there had been a succession to the business within the meaning of S. 25 (4) and S. 25A (2). [P 151 C 2]

(Per Full Bench) — (ii) that where an assessment has been made under S. 25A (2) on the members of a Hindu divided family, the family which carried on the business as an undivided family during a portion of the year before its succession is entitled to relief under S. 25 (4). The family was, therefore, entitled to the relief claimed. [P 155 C 1, 2]

(b) Income-tax Act (1922), Ss. 25 and 25A — Mode of assessment under each section stated — S. 25 is intended to meet cases where business is carried on after end of previous year and before expiry of year of assessment and looks at situation whether tax was paid under Act of 1918 — S. 25A on other hand deals with assessment of income of business of disrupted Hindu family—Each section deals with different position.

Under S. 25, the period, the income of which has to be assessed, is not only the previous year but the previous year and the period for which the business was carried on after the end of the previous year before its discontinuance or succession and it looks at the position of the person discontinuing or transferring the business from the point of view of his having paid income-tax on that business under the Act of 1918. Where no tax was paid under the Act of 1918, assessment may be made on the income not only of the previous year but also on the income of that portion of the year of assessment for which the business was carried on. But where the person discontinuing the business was also charged under the Act of 1918, though the period, the income of which has to be assessed remains the same, namely, the previous year and that portion of the year of assessment for which the business was carried on, a special rule for determining the tax payable on the income of this period has been enacted. It is not necessary that the business should have been totally discontinued; what has to be seen is whether the person who carried on the business in the previous year has severed his connection with it after the previous year either by discontinuing it or by assigning it to some one else. Unlike S. 25, S. 25A deals with an entirely different position. It says nothing about the chargeability of a business under the Act of 1918 and the period the income of which has to be taxed is the normal period, namely, the previous year. It envisages a position where, at the time of making an assessment on the income of the previous year, the Income-tax Officer finds or it is alleged before him that the family which was in the past assessed as an undivided Hindu family exists no longer having partitioned its property or that the business, profession or vocation hitherto carried on by a Hindu undivided family has passed on to some one else and the family has also disrupted and partitioned its property after the assignment of the business. [P 153 C 1, 2]

The section provides that in such a case the income of the family during the period that it

carried on the business as an undivided family shall be assessed, and the tax payable on it levied on the members or groups of the family according to the portion of the joint family property allotted to them. Thus, the subject-matter of this section is wholly different from the subject-matter of the preceding section and each of these sections deals with an entirely different set of circumstances. There is no inconsistency, repugnancy or contrariety between them nor do they overlap each other. Each deals with a different position and enacts a different rule. [P 153 C 2]

(c) Income-tax Act (1922), Ss. 25A (2) and S. 26 (2) — Distinction between, stated.

There is some overlapping between S. 26 (2) and S. 25A (2) where an undivided Hindu family has assigned its business to some one else in a particular year and has also disrupted and partitioned its property after the assignment. The case apparently comes under S. 26 (2) because *ex hypothesi* during that year the business was carried on by the family for a portion of the year and by the successor for the remaining portion of the year. Section 25A (2) also is applicable to cases where there has been a succession to the business of an undivided Hindu family and a subsequent partition. Therefore, both these sub-sections would apply to such a situation. But a closer scrutiny of these two provisions would show that the moment it is found that the family has been succeeded in its business and partitioned its property after such succession, the Income-tax Officer must proceed under S. 25A (2), the provisions of that section being more specific than the provisions of S. 26 (2). Section 25A does not apply unless there has been a complete disruption and partition of the whole of the property of an undivided Hindu family and mere transfer of a business by the family without complete partition of its property does not invite the application of that section. The assessee under S. 25A (2) is the members or groups of the quondam undivided Hindu family whereas under S. 26 (2) the assessee is the family itself because *ex hypothesi* the family exists though one of its assets, namely, the family business, has been transferred. Section 26 (2) deals with those residuary cases where the family has not partitioned its entire property though its business has been transferred to some one else. The assessee under S. 26 (2) is the undivided family in respect of the income earned by it from such business whereas under S. 25A (2) the assessee is the member of the quondam Hindu undivided family. There is thus no conflict between these two sub-sections each of which provides for an entirely different position. [P 153 C 2; P 154 C 1]

(d) Interpretation of statutes—General provision cannot derogate from special provision — Income-tax Act (1922), Ss. 25 (4) and 25A (2).

(Per *Din Mohammad J.*)—When once a Legislature has made a special provision about a certain class of cases, any general provision of law cannot derogate from it. Section 25 (4) dealt with all kinds of succession to any business, profession or vocation on which tax was at any time charged under the provisions of the Income-tax Act, 1918. Consequently, when the Legislature enacted the new provision in S. 25A (2) it could not in any manner prejudicially affect or come into conflict with the provision already made in S. 25 (4). [P 156 C 1]

(e) Interpretation of statutes—Courts should try to reconcile various provisions of law touching same subject.

(Per *Din Mohammad J.*)—A Legislature should not be presumed to have laid itself open to the charge of inconsistency in the same statute in enacting conflicting provisions of law. Courts should always make a genuine effort to reconcile the various provisions that exist in the same statute touching the same subject and to presume that the Legislature has been reasonable and consistent : ('37) 24 A. I. R. 1937 Lah. 830, *Rel. on.* [P 156 C 1]

S. M. Sikri and Jindra Lal — for Petitioner.

Kirpa Ram Bajaj and Narindra Nath Chopra — for Respondent.

JUDGMENT OF THE DIVISION BENCH.

Din Mohammad J. — This is a case stated by the Income-tax Appellate Tribunal on the application of the Commissioner of Income-tax. The relevant facts are these. The assessee, a Hindu undivided family, known as Saran Singh Ram Singh, carried on the business of guarantee brokers to the Central Bank of India Ltd. as well as that of Indian drugs and yarn at Amritsar and the business of flea seed husk at Sidhpur in Baroda State. The business of Indian drugs and yarn existed prior to 1918 while the other two businesses were started subsequently. On 17th April 1941, when the family was composed of Sardar Partap Singh and his two sons, S. Lachhman Singh and S. Bahadur Singh a deed of partition of the joint family business was executed by the persons concerned by which the business of guarantee brokers was allotted to S. Partap Singh, that of flea seed husk to S. Lachhman Singh and that of Indian drugs and yarn to S. Bahadur Singh. It was stated in the deed that the family had actually disrupted on 25th March 1941, and divided all the immovable and movable property along with business assets, furniture etc., on that date. Consequent upon this, S. Partap Singh submitted an application to the Income-tax Officer claiming an order under S. 25A of the Act and this was made on 31st July 1941. Simultaneously, in respect of the Indian drugs and yarn business at Amritsar, he put in another application under sub-s. (3) of S. 25, which deals with discontinuance of any business, profession or vocation on which tax was at any time charged under the provisions of the Income-tax Act, 1918. In the course of arguments before the Income-tax Officer, however, he relied on sub-s. (4) of S. 25 as well, which deals with succession to such business. The Income-tax Officer, on the same date, repelled this contention holding that neither sub-s. (3) nor sub-s. (4) could be invoked.

Against this decision, the assessee took an appeal to the Appellate Assistant Commissioner, which was rejected on 10th December 1941. The assessee then preferred an appeal to the Income-tax Appellate Tribunal and the Bench before whom the appeal came on for hearing allowed the appeal holding that the assessee was entitled to the benefit of sub-s. (4) of S. 25. Being dissatisfied with this decision, the Commissioner of Income-tax moved the Tribunal with the result as stated above. It is contended on behalf of the Commissioner that, in the first place, in view of cls. (4) and (9) of the deed, S. Bahadur Singh was to run a business of his own and not the old business in the old style, although he was allowed to retain its name, and secondly, even if it were a case of succession, the case fell under the specific provisions of sub-s. (2) of S. 25A, inasmuch as the business succeeded to was formerly carried on by a Hindu undivided family. The assessee, on the other hand, refers to a decision of a Bench of this Court, of which I was a member, reported in 18 Lah. 325,¹ as well as to a judgment of five Judges of the Madras High Court reported in 12 I. T. R. 97,² and urges that he is clearly entitled to the benefit of sub-s. (4) of S. 25. It may be observed that the assessee no longer relies on sub-s. (3) of that section, conceding frankly that the business had not discontinued as contemplated by that sub-section.

I may say at once that the first contention raised by the Commissioner is devoid of force. There is no question but that S. Bahadur Singh was to continue the old business as it stood at the material time, and although the existing contract relating to flea seed and flea-seed husk was to be carried out by S. Lachhman Singh, it did not in any way convert S. Bahadur Singh's business into a new business of his own. The second question raised by the Commissioner, however, deserves full consideration. Before the Income-tax Act was amended in 1939, S. 25 dealt with assessment in the case of a discontinued business, profession or vocation and consisted of four sub-sections. Sub-sections (1) and (2) dealt with a business, profession or vocation on which income-tax was *not* at any time charged under the provisions of the Income-tax Act, 1918; sub-s. (3) dealt

with a business, profession or vocation on which tax *was* so charged, and sub-s. (4) laid down the procedure to be followed when making an assessment under sub-s. (1) or sub-s. (3). Section 25A dealt with assessment after partition of a Hindu undivided family. Sub-section (1) of this section provided for the disposal of a claim made by any member of a Hindu undivided family that a partition has taken place and sub-s. (2) enacted that when such a claim was admitted, the Income-tax Officer was bound to make an assessment as if no separation or partition had taken place and hold each member or group of members liable for a share of the tax on the income so assessed. Sub-section (3) laid down the consequences which would follow in case the claim was rejected. Sub-section (1) of S. 26 dealt with a change in the constitution of a firm and sub-s. (2) of the same section provided for a succession to a business, profession or vocation at any time before assessment was made.

After the amendment introduced in 1939, however, S. 25 was expanded into six sub-sections. Sub-sections (1) and (2) of that section were left intact. Sub-section (3) was amended and the words "then, unless there has been a succession by virtue of which the provisions of sub-s. (4) have been rendered applicable" were added. Old sub-s. (4), with consequential amendment, was inserted as sub-s. (6) and two new sub-sections were added in the shape of sub-ss. (4) and (5). By the new sub-s. (4) it was enacted that where the person who was at the commencement of the Income-tax (Amendment) Act, 1939 [7 [VII] of 1939], carrying on any business, profession or vocation on which tax was at any time charged under the provisions of the Income-tax Act, 1918 (7 [VII] of 1918), was succeeded in such capacity by another person, the change not being merely a change in the constitution of a partnership, no tax would be payable by the first mentioned person in respect of the income, profits and gains of the period between the end of the previous year and the date of such succession, and such person could further claim that the income, profits and gains of the previous year should be deemed to have been the income, profits and gains of the said period. It was further provided that where any such claim was made, an assessment would be made on the basis of the income, profits and gains of the said period, and, if an amount of tax had already been paid in respect of the income, profits and gains of the previous year exceeding the

1. (37) 24 A.I.R. 1937 Lah 830 : I.L.R. (1937) 18 Lah. 325 : 172 I. C. 821, Ram Rakhamal & Sons Ltd. v. Commissioner of Income-tax, Lahore.

2. (44) 31 A.I.R. 1944 Mad. 245 : I. L. R. (1944) Mad. 504 : 213 I. C. 159 : (1944) 12 I. T. R. 97 (F.B.), Govinda Rajulu Chettiar v. Commissioner of Income-tax, Madras.

amount payable on the basis of such assessment, a refund would be given of the difference. The new sub-s. (5) prescribed the period of limitation for claiming the relief afforded under sub-s. (3) or sub-s. (4). Section 25A was also amended. In sub-s. (1) of this section, the words "that a separation of the members of the family has taken place" were deleted and in sub-s. (2) thereof the following words were added:

"Or where any person has succeeded to a business, profession or vocation formerly carried on by a Hindu undivided family whose joint family property has been partitioned on or after the last day on which it carried on such business, profession or vocation."

Both sub-ss. (1) and (2) of S. 26 were also materially altered and in sub-s. (2) it was provided that where a person carrying on any business, profession or vocation had been succeeded in such capacity by another person, such person and such other person would, subject to the provisions of sub-s. (4) of S. 25, each be assessed in respect of his actual share, if any, of the income, profits and gains of the previous year. It is obvious that although originally succession was dealt with in S. 26 alone, after the amendment, the succession to a business carried on by a Hindu undivided family was specifically provided for in sub-s. (2) of S. 25A, irrespective of the fact whether such business was at any time charged under the provisions of the Income-tax Act, 1918, or not. The question naturally arises why in the face of this provision, the succession to a business, carried on by a Hindu undivided family which was charged under the Income-tax Act, 1918, should, in spite of this amendment, be governed by sub-s. (4) of S. 25 which deals generally with such business. No assistance for the solution of this problem can be sought from 18 Lah. 325,¹ for the simple reason that that decision was given under the old Act and not the amended Act. The Madras case, however, is relevant and fully supports the contention raised on behalf of the assessee. It is unfortunate, however, that in the judgment delivered by Sir Lionel Leach C. J., on behalf of the Bench, there is no discussion of the new provisions made in sub-s. (2) of S. 25A, and no reasons recorded as to why in the presence of this specific provision recourse should be had to the general provision as contained in sub-s. (4) of S. 25.

As I look at the matter, the specific provision made in sub-s. (2) of S. 25A should, in accordance with the fundamental canon of the interpretation of statutes, override

the general provisions made in sub-s. (4) of S. 25, and consequently whether a business carried on by a Hindu undivided family was at any time charged under the provisions of the Income-tax Act, 1918, or not, the succession to it should be governed by sub-s. (2) of S. 25A. Counsel for the assessee, however, argues that in these circumstances, a Hindu undivided family would be deprived of the benefit provided for in sub-s. (4) of S. 25 as well as that of sub-s. (2) of S. 26 and this, according to him, the Legislature could not intend. No doubt the consequence envisaged by counsel would follow if this procedure is adopted, but sitting as a Court of law our function is merely to administer the law as it is, and not to be influenced by the consideration whether the result is equitable or otherwise. We cannot ignore that the words newly inserted in sub-s. (2) unequivocally contemplate the succession of any person to a business, profession or vocation formerly carried on by a Hindu undivided family whose joint family property has been partitioned on or after the last day on which it carried on such business, profession or vocation, and that there is no qualification or reservation attached to them nor can we introduce in these words any qualification or reservation that may tend to bring this provision into consonance with sub-s. (4) of S. 25. Left to myself, therefore, I would agree with the Commissioner that in the case of a Hindu undivided family it is sub-s. (2) of S. 25A that is to be applied and not sub-s. (4) of S. 25, but as there is a judgment of five Judges of the Madras High Court in favour of the contrary view, I would forward this case to the Hon'ble Chief Justice with a recommendation that a larger Bench may be constituted to dispose of the matter in controversy.

Sale J.—I agree with the recommendation proposed.

[When the matter came before the Bench of three Judges consisting of Harries C. J. and Din Mohammad and Sale JJ. it referred the same to a Bench of five Judges.]

Judgment of the Full Bench

Munir J.—This is a case stated by the Appellate Tribunal under sub-s. (1) of S. 66, Income-tax Act. The question to which an answer has to be returned is:

"Whether, on the facts of the case, the application of S. 25A (2) is a bar to the assessee's claim either under S. 25A (4) or S. 25 (3)?"

The question came to be referred in the following circumstances: The assessee was a Hindu undivided family consisting of

three members, namely, Partap Singh and his sons, Lachhman Singh and Bahadur Singh. The family carried on business of guarantee brokers to the Central Bank of India Ltd., and of grocery and yarn at Amritsar and of flea seed husk at Sidhpur in the Baroda State. Up to the year of assessment 1940-41, the family was assessed as undivided but in the course of the assessment for the year 1941-42, the family submitted an application under S. 25A of the Act and claimed that a partition had taken place among the members of the family and all the joint property divided between the father and the sons on 25th March 1941. The deed of partition is dated 17th April 1941, but it refers to the date of partition as 25th March 1941. According to the deed of partition, the business of guarantee brokers was allotted to Sardar Partap Singh, that of flea seed husk to Sardar Lachhman Singh and that of grocery and yarn to Sardar Bahadur Singh. Of these businesses, that of grocery and yarn which fell to the share of Sardar Bahadur Singh was an old business on which tax had been charged under the Income-tax Act, 1918. The Income-tax Officer after the necessary enquiry recorded an order under sub-s. (1) of S. 25A recognising that the family had partitioned its property on 25th March 1941, and made assessment on the members of the family under sub-s. (2) of S. 25A. The family claimed that since the business of grocery and yarn had been assessed to income-tax under the Act of 1918, it was, under sub-s. (3) of S. 25 of the Act, not liable to pay any tax on the income from 18th April 1940, to 25th March 1941, i. e., from the date of commencement of the previous year to the date of discontinuance of the business. The Income-tax Officer rejected the claim, holding that the business had neither been discontinued within the meaning of sub-s. (3) nor succeeded within the meaning of sub-s. (4) of S. 25 and that, therefore, the family was not entitled to the relief claimed. From this order, an appeal was taken to the Assistant Commissioner who agreed with the Income-tax Officer and dismissed the appeal. Thereupon the family appealed to the Appellate Tribunal which by its order dated 16th September 1942, allowed the appeal and held that there had been a succession to the grocery and yarn business within the meaning of sub-s. (4) of S. 25 of the Act, and that the family was entitled to the benefit of that sub-section. The Commissioner of Income-tax being dissatisfied with this order required the

Appellate Tribunal to state the case to the High Court. In compliance with this application, the Tribunal stated the case and referred to this Court the following two questions :

(1) Whether, in the circumstances of the case, there was succession by Sardar Bahadur Singh to the *Kariana* and yarn business, or the business was split up between Sardar Bahadur Singh and Sardar Lachhman Singh so as to constitute discontinuance of the old business?

(2) Whether, on the facts of the case, the application of S. 25A (2) is a bar to the assessee's claim either under S. 25 (4) or S. 25 (3) ?

The reference came up before my brothers Din Mohammad and Sale who, by their order dated 14th April 1944, held that there had been a succession to the grocery and yarn business within the meaning of sub-s. (4) of S. 25 and sub-s. (2) of S. 25A but in view of the novelty and importance of the point involved in the second question they referred the case to a Full Bench. The contention of the learned counsel for the Commissioner is that since the Hindu undivided family did not exist at the time of the assessment no relief under sub-s. (4) of S. 25 could be granted and that in any case since sub-s. (2) of S. 25A is applicable to the case, sub-s. (4) of S. 25 ceases to apply. In order to appreciate this contention it is necessary to refer to the relevant provisions of Ss. 25, 25A and 26 of the Act, which are as follows :

"25. (1) Where any business, profession or vocation to which sub-section (3) is not applicable is discontinued in any year, an assessment may be made in that year on the basis of the income, profits or gains of the period between the end of the previous year and the date of such discontinuance in addition to the assessment, if any, made on the basis of the income, profits or gains of the previous year.

(3) Where any business, profession or vocation . . . on which tax was at any time charged under the provisions of the Income-tax Act, 1918, is discontinued, then, unless there has been a succession by virtue of which the provisions of sub-s. (4) have been rendered applicable, no tax shall be payable in respect of the income, profits and gains of the period between the end of the previous year and the date of such discontinuance, and the assessee may further claim that the income, profits and gains of the previous year shall be deemed to have been the income, profits and gains of the said period. Where any such claim is made, an assessment shall be made on the basis of the income, profits and gains of the said period, and if an amount of tax has already been paid in respect of the income, profits and gains of the previous year exceeding the amount payable on the basis of such assessment, a refund shall be given of the difference.

(4) Where the person who was at the commencement of the Income-tax (Amendment) Act, 1939, carrying on any business, profession or vocation on which tax was at any time charged under the provisions of the Income-tax Act, 1918, is succeeded in such capacity by another person, the change not

being merely a change in the constitution of a partnership, no tax shall be payable by the first mentioned person in respect of the income, profits and gains of the period between the end of the previous year and the date of such succession, and such person may further claim that the income, profits and gains of the previous year shall be deemed to have been the income, profits and gains of the said period. Where any such claim is made, an assessment shall be made on the basis of the income, profits and gains of the said period, and, if an amount of tax has already been paid in respect of the income, profits and gains of the previous year exceeding the amount payable on the basis of such assessment, a refund shall be given of the difference.

(6) Where an assessment is to be made under sub-s. (1), sub-s. (3) or sub-s. (4), the Income-tax Officer may serve on the person whose income, profits and gains are to be assessed, or, in the case of a firm, on any person who was a member of such firm at the time of its discontinuance, or, in the case of a company, on the principal officer thereof, a notice containing all or any of the requirements which may be included in a notice under sub-s. (2) of S. 22, and the provisions of this Act shall, so far as may be, apply accordingly as if the notice were a notice issued under that sub-section.

25A. (1) Where, at the time of making an assessment under S. 23, it is claimed by or on behalf of any member of a Hindu family hitherto assessed as undivided that a partition has taken place, among the members of such family, the Income-tax Officer shall make such inquiry thereinto as he may think fit, and if he is satisfied that the joint family property has been partitioned among the various members or groups of members in definite portions he shall record an order to that effect:

Provided that no such order shall be recorded until notices of the inquiry have been served on all the members of the family.

(2) Where such an order has been passed, or where any person has succeeded to a business, profession or vocation, formerly carried on by a Hindu undivided family whose joint family property has been partitioned on or after the last day on which it carried on such business, profession or vocation, the Income-tax Officer shall make an assessment of the total income received by or on behalf of the joint family as such, as if no partition had taken place, and each member or group of members shall, in addition to any income-tax for which he or it may be separately liable and notwithstanding anything contained in sub-s. (1) of S. 14, be liable for a share of the tax on the income so assessed according to the portion of the joint family property allotted to him or it;

and the Income-tax Officer shall make assessments accordingly on the various members and groups of members in accordance with the provisions of S. 23:

Provided that all the members and groups of members whose joint family property has been partitioned shall be liable jointly and severally for the tax assessed on the total income received by or on behalf of the joint family as such.

(3) Where such an order has not been passed in respect of a Hindu family hitherto assessed as undivided, such family shall be deemed, for the purposes of this Act, to continue to be a Hindu undivided family.

26. (2) Where a person carrying on any business, profession or vocation has been succeeded in such

capacity by another person, such person and such other person shall, subject to the provisions of sub-s. (4) of S. 25, each be assessed in respect of his actual share, if any, of the income, profits and gains of the previous year;"

Under the Act of 1918, assessment was made on the income of the year of assessment but by the Act of 1922 the "previous year" was made the basis of assessment. Thus, in many instances a business, profession or vocation which had been taxed under the Act of 1918 in the year of assessment was also taxed under the Act of 1922, the assessment year of the Act of 1918 becoming the previous year under the Act of 1922. To avoid double taxation on the income of the same period the Act provides that where a business, profession or vocation on which income-tax was paid under the Act of 1918 is discontinued or where the person who was carrying on any such business, profession or vocation is succeeded by another person, the income, profits and gains of the period commencing from the date of expiry of the previous year to the date of discontinuance or succession is not to be taxed. This is the principle underlying S. 25 but its application to the facts of a particular case presents several aspects. The marginal note of the section is "Assessment in case of discontinued business" but an analysis of its provisions leads to the following results:

(1) Generally the income which has to be taxed is the income of the previous year. But if a business is discontinued the section, contrary to the general rule, gives to the Income-tax Officer the power to make assessment in the year of assessment on the basis of the income, profits or gains of the assessment year in addition to the assessment, if any, of the previous year. Thus, the period of income, profits and gains of which may be assessed in such a case is the period for which the business was carried on after the expiry of the previous year, or such period and the previous year if not already assessed, though in the latter case the income for each of these periods has to be separately assessed by the same order (sub-s. 1).

(2) It may be that the business that has been discontinued in a particular year was a business on which tax was charged under the Act of 1918. In such a case, the section provides that tax shall not be payable in respect of the income, profits and gains of the period for which the business was carried on after the end of the previous year. The section further provides that in such a case the assessee may claim that the income of

the previous year shall be deemed to have been the income of the period for which the business was carried on after the end of the previous year. Where the assessee makes such a claim, the income of the period for which the business was carried on after the end of the previous year shall be assessed and if the tax payable on it is less than the tax paid or payable on the income of the previous year, the excess shall be refunded or allowed, as the case may be, to the assessee (sub-s. 3).

(3) It may be that a business which was charged to tax under the Act of 1918 is not discontinued but is passed on to another person, the person carrying it on in the past completely severing his connection with it. In such a case, the section provides that the person transferring the business may claim the same benefit as a person whose business has discontinued (sub-s. 4).

The important point to remember about S. 25 is that the period the income of which has to be assessed is not only the previous year but the previous year and the period for which the business was carried on after the end of the previous year before its discontinuance or succession and that it looks at the position of the person discontinuing or transferring the business from the point of view of his having paid income-tax on that business under the Act of 1918. Where no tax was paid under the Act of 1918 assessment may be made on the income not only of the previous year but also on the income of that portion of the year of assessment for which the business was carried on. But where the person discontinuing the business was also charged under the Act of 1918, though the period, income of which has to be assessed, remains the same, namely, the previous year and that portion of the year of assessment for which the business was carried on, a special rule for determining the tax payable on the income of this period has been enacted. It is not necessary that the business should have been totally discontinued; what has to be seen is whether the person who carried on the business in the previous year has severed his connection with it after the previous year either by discontinuing it or by assigning it to some one else. It is, therefore, clear that the section is intended to meet only those cases where business has been carried on after the end of the previous year and before the expiry of the year of assessment and looks at the situation from the point of view whether or not any tax on such business was paid under the Act of

1918. Unlike S. 25, S. 25A deals with an entirely different position. It says nothing about the chargeability of a business under the Act of 1918 and the period, the income of which has to be taxed, is the normal period, namely, the previous year. It envisages a position where, at the time of making an assessment on the income of the previous year, the Income-tax Officer finds or it is alleged before him that the family which was in the past assessed as an undivided Hindu family exists no longer having partitioned its property or that the business, profession or vocation hitherto carried on by a Hindu undivided family has passed on to some one else and the family has also disrupted and partitioned its property after the assignment of the business. The section provides that in such a case the income of the family during the period that it carried on the business as an undivided family shall be assessed and the tax payable on it levied on the members or groups of the family according to the portion of the joint family property allotted to them. Thus, the subject-matter of this section is wholly different from the subject-matter of the preceding section and each of these sections deals with an entirely different set of circumstances. There is no inconsistency, repugnancy or contrariety between them nor do they overlap each other. Each deals with a different position and enacts a different rule. As pointed out in 18 Lah. 325¹ each section in the Income-tax Act deals only with the matters specified therein and goes no further and each section completely covers the matters with which it deals. Interpreted in this way, each of these two provisions appears to me to deal with an entirely different subject.

The only relevant provision in S. 26 is sub-s. (2) which deals with cases where there has been succession to a business, profession or vocation and provides that the income of each of the persons, namely, the person carrying on the business, profession or vocation in the past and his successor shall be assessed in respect of his actual share in the income, profits and gains of the previous year. There is some overlapping between this sub-section and sub-s. (2) of S. 25A, where an undivided Hindu family has assigned its business to some one else in a particular year and has also disrupted and partitioned its property after the assignment. The case apparently comes under sub-s. (2) of S. 26, because *ex hypothesi* during that year the business was carried on by the

family for a portion of the year and by the successor for the remaining portion of the year. Sub-section (2) of S. 25A also is applicable to cases where there has been a succession to the business of an undivided Hindu family and a subsequent partition. Therefore, both these sub-sections would apply to such a situation. But a closer scrutiny of these two provisions would show that the moment it is found that the family has been succeeded in its business and partitioned its property after such succession, the Income-tax Officer must proceed under sub-s. (2) of S. 25A, the provisions of that section being more specific than the provisions of sub-s. (2) of S. 26. It has been held by the Privy Council in 10 I. T. R. 457³ that S. 25A of the Act does not apply unless there has been a complete disruption and partition of the whole of the property of an undivided Hindu family and that the mere transfer of a business by the family without complete partition of its property does not invite the application of that section. Cases are, therefore, possible where an undivided Hindu family might assign its business which is only one of its assets and retain a joint status in respect of all other assets. To such a case S. 25A will not be applicable and the Income-tax Officer will have to proceed under sub-s. (2) of S. 26. The assessee under S. 25A, is the members or groups of the quondam undivided Hindu family whereas under sub-s. (2) of S. 26, the assessee is the family itself because *ex hypothesi* the family exists though one of its assets, namely, the family business, has been transferred. It seems to me, therefore, that there is really no conflict between sub-s. (2) of S. 26 and sub-s. (2) of S. 25A and that the former deals with these residuary cases where the family has not partitioned its entire property though its business has been transferred to some one else. The assessee under sub-s. (2) of S. 26 is the undivided family in respect of the income earned by it from such business whereas under sub-s. (2) of S. 25A the assessee is the members of the quondam Hindu undivided family. There is thus no conflict between these two sub-sections each of which provides for an entirely different position.

It is admitted that if the case be covered by sub-s. (2) of S. 26, the family would be

entitled to the relief claimed. It is further admitted that, so far as the right to the relief claimed is concerned, there is no real difference of principle between the cases covered by sub-s. (2) of S. 26 and those where the assessment has been made under sub-s. (2) of S. 25A. It is, however, contended that since the provisions of sub-s. (2) of S. 26 are made expressly subject to the provisions of sub-s. (4) of S. 25 and there is no such reservation in cases where the Income-tax Officer proceeds under sub-s. (2) of S. 25, the Legislature must be deemed to have impliedly negated the right to relief where the family has disrupted and partitioned its property. If there had been an express provision to the effect that a Hindu family after disruption and partition of its property is not entitled to the benefit of sub-s. (4) of S. 25, or even if this conclusion had been implicit in the statute, it would have been our duty to negative the right to relief irrespective of whether there was or was not any reason for the disallowance of such relief. But it is conceded that there is no such express provision, and I am unable to hold that there is in the statute any necessary implication that whereas a family which retains its undivided status at the time of the assessment, though it has transferred one of its assets, namely, the family business, is entitled to the benefit of sub-s. (4) of S. 25, no such right to relief exists in cases where the family having completely disrupted itself and partitioned all its property does not exist at the time of the assessment. Emphasis was laid by the learned counsel for the Commissioner on the difference in the phraseology of sub-s. (3) and sub-s. (4) of S. 25, and it was contended that whereas the word used in former is "assessee," the words used in sub-s. (4) are "such person." This difference in the terms of these sub-sections was, in my opinion, necessary, and is an argument against the contention of the learned counsel for the Commissioner rather than an argument in his favour. It must be remembered that in cases contemplated by sub-s. (3), the business having been discontinued, the assessment has to be made on the person who carried on such business during a portion of the year and, therefore, the assessee is that person. In cases contemplated by sub-s. (4) of S. 25, however, the assessee may not be the person who has transferred the business. The right to relief under this sub-section vests only in the person who has been succeeded in the business who may not necessarily be the assessee. For instance, in

3. ('42) 29 A. I. R. 1942 P. C. 57 : I. L. R. (1943) All. 69 : I. L. R. (1942) Kar. P. C. 132 : 69 I. A. 119 : 202 I. C. 483 : (1942) 10 I. T. R. 457 (P. C.), Sundar Singh Majithia v. Commissioner of Income-tax.

this very case, the assessment being under sub-s. (2) of S. 25A, the assessee is the person who constituted the undivided family, but the right to relief vests in the undivided family whose income has to be assessed under that sub-section. The use of the word "assessee" in this sub-section would clearly have been incorrect, and if that word had been used, the sub-section would not have applied to cases where the person transferring the business was not the assessee. This difference, therefore, in the language of sub-s. (3) and (4) is, in my opinion, intentional and cannot lead to the inference that the right to relief can only be claimed by an assessee and that where an undivided Hindu family ceases to exist as such after disruption and partition of its assets, the sub-section ceases to be applicable.

In my opinion, it is impossible to find any reason to exclude a quondam Hindu undivided family from the benefit of sub-s. (4) and no such reason beyond the fact that the family no longer exists as undivided has been advanced. Where, as in this case, no question of refund of the tax paid on the income of the previous year arises, the Act makes it incumbent on the Income-tax Officer not to tax the income of the period between the end of the previous year and the date of succession. It is not necessary that any claim for such exemption should be made and, therefore, nothing turns on the circumstance that at the time of assessment the person entitled to the exemption is not in existence. The case is fully embraced by the provisions of the sub-section and, I am unable to discover anywhere in the Act, any express or implied provision to a contrary effect. The contention raised before us was put forward on behalf of the Commissioner in the Madras Full Bench case, *I. L. R. (1944) Mad. 504*,² but it was repelled and all the five Judges who constituted that Bench agreed that notwithstanding the partition, the assessee's family, by virtue of S. 25A, must be regarded as joint for the purposes of assessment, which must include the grant of relief under S. 25 (4). In my opinion, therefore, the decision of the Tribunal was correct and the answer to the question formulated must be against the Commissioner. My answer to the question formulated is that where an assessment has been made under sub-s. (2) of S. 25A on the members of a Hindu divided family, the family which carried on the business as an undivided family during a portion of the year before its succession is entitled to relief under sub-

s. (4) of S. 25. The family will have its costs of the reference.

Sale J. — I agree.

Din Mohammad J.—The circumstances in which this case was stated by the Income-tax Appellate Tribunal and the reasons for which, while sitting as a member of a Division Bench, I decided to refer one of the two questions propounded by the Tribunal to a larger Bench, are fully set out in my order, dated 14th April 1944, and need not be recapitulated. Suffice it to say that the short question that falls for determination at this stage is whether in the circumstances of this case the assessee cannot legally claim the benefit of sub-s. (4) of S. 25, Income-tax Act, on account of the provision of law newly introduced in 1939 in sub-s. (2) of S. 25A as regards succession to a business carried on by a Hindu undivided family. The reply to this question depends upon the true construction to be put upon sub-s. (2) of S. 25A in the light of the other provisions of the statute that are closely connected with it. Prior to the amendment of 1939, S. 25 was headed "Assessment in case of discontinued business" and S. 25A, "Assessment after partition of a Hindu undivided family." After the amendment, although the headings of both these sections were left intact, their subject-matter was extended beyond their scope. Sub-section (4) was added to S. 25 despite the fact that it dealt with succession to a business, profession or vocation on which tax was at any time charged under the provisions of the Income-tax Act, 1918 (7 [VII] of 1918) and sub-s. (2) of S. 25A was so amended as to include the case of a person who "has succeeded to a business, profession or vocation formerly carried on by a Hindu undivided family whose joint family property has been partitioned on or after the last day on which it carried on such business, profession or vocation." It is obvious that having regard to the limited scope of the headings of these sections the matter of succession could not be properly inserted therein. This defect in drafting is mainly responsible for the difficulty that has arisen in the interpretation of these provisions. On behalf of the Commissioner of Income-tax, it is contended that in view of the new provision of law introduced in sub-s. (2) of S. 25A all cases of succession to an undivided Hindu family should be governed by this sub-section. In my view, however, this argument suffers from more defects than one. Firstly, it runs counter to the well established principle of the interpretation of statutes that when

once a Legislature has made a special provision about a certain class of cases, any general provision of law cannot derogate from it. Sub-section (4) of S. 25 dealt with all kinds of succession to any business, profession or vocation on which tax was at any time charged under the provisions of the Income-tax Act, 1918 (7 [VII] of 1918). Consequently, when the Legislature enacted the new provision in sub-s. (2) of S. 25A, it could not, in any manner, prejudicially affect or come into conflict with the provision already made in sub-s. (4) of section 25. Secondly, it offends against another well-recognised principle of the interpretation of statutes that a Legislature should not be presumed to have laid itself open to the charge of inconsistency in the same statute in enacting conflicting provisions of law. Courts should always make a genuine effort to reconcile the various provisions that exist in the same statute touching the same subject and to presume that the Legislature has been reasonable and consistent. In this connection, I may also refer to the following observations made by me in 18 Lah. 325¹ at page 333 :

“Considering that in the matter of the interpretation of statutes our first effort should be to reconcile the various provisions of an enactment with one another and to assign to the clear words of a statute the meaning which they ordinarily carry and thinking at the same time that the Legislature has not been guilty of redundancy of expression or repetition of subject, the irresistible conclusion to which we are driven is that so far as the scheme of the Act goes (a) each section deals only with the matters specified therein and goes no further and (b) each section completely covers the matter with which it deals.”

Thirdly, if effect is given to the interpretation suggested on behalf of the Commissioner of Income-tax, grave injustice will result, inasmuch as without any rhyme or reason a Hindu undivided family, otherwise entitled to the benefit of sub-s. (4) of S. 25, will at once be deprived of it. Sitting as a Court of law we should always guard against all inequitable consequences and put such construction on the statute as to avoid them. Interpreted in this manner, the new provision of law introduced in sub-s. (2) of S. 25A will not debar the assessee from claiming the benefit of sub-s. (4) of S. 25. I would accordingly answer the question propounded by the Tribunal in the negative, and grant the family its costs.

Mahajan J. — In my opinion, the question “whether on the facts of the case, the application of S. 25A (2) is a bar to the assessee’s claim either under S. 25 (4) or

S. 25 (3)” should be answered in the negative. Shortly stated my reasons in support of the answer are these :

Section 25A (2) by a statutory command keeps alive the joint Hindu family for the purpose of making an assessment in spite of the fact that it has ceased to exist and the fact of the partition of its property has already been recognized by the Income-tax Officer under sub-s. (1) of S. 25A. An assessment can be made on the total income of the joint family as such as if no partition has taken place, in other words, it is deemed to be alive for the purpose of determining the assessable income. Once an assessment order is made in the manner required by sub-s. (2) of S. 25A then the amount of the tax can be realized jointly or severally from the persons who were its members before the partition. For purposes of payment of the tax, the joint liability of the ex-members of the family still continues and this can only arise on the hypothesis that the family is deemed to exist in spite of partition even for this purpose, as on no other principle can a tax assessed on various members or groups of members separately be recovered jointly from all of them. The true scope of S. 25A (2), in my view, is that it amplifies, and extends the ambit of S. 23, the assessment section, and authorises the assessing officer in making the assessment to assess a joint Hindu family after it has disrupted by ignoring the partition. If my reading of the section is correct, then it is obvious that it in no way conflicts with the provisions of S. 25 (4) which are intended to grant relief in respect of double tax paid by persons who were assessed under the Act of 1918 and were also charged advance tax when the Act of 1922 came into force. The two sections, namely, S. 25A (2) and S. 25 (4) deal with different subjects, the former was not intended to operate as an exception to the latter so as to deprive an undivided Hindu family one of the taxable units under the Act from its benefit. It could not be the intention or the object of the Legislature that relief in respect of double tax already charged should only be allowed to three out of the four taxable identities dealt with by the Act. I cannot ascribe to the Legislature an intention to the effect that it wished to discriminate between the different persons liable to the charge of income-tax under S. 3 of the Act and that its object was to give relief and confer benefit on all these units excepting an undivided Hindu family in whose case it somehow considered that the advance tax

paid by it on its business in the year 1922 should be forfeited.

Further I think that Ss. 25A and 26 (2) are not mutually exclusive. As observed by their Lordships of the Privy Council in 49 C.W.N. 784,⁴ S. 26 is primarily directed not to the circumstances in which relief for taxation is given but to the apportionment of tax where relief is not given. This section, therefore, does not in any way affect the contention of the assessee. As the undivided Hindu family is deemed to continue for the purposes of assessment, in making the assessment under S. 25A relief under S. 25 (4) can properly be given. This relief was rightly allowed by the Tribunal in this case as the business of the joint family was assessed to tax under the Income-tax Act of 1918 and there being a succession to the business, the joint family was entitled to the benefit of the relief conferred by S. 25 (4) of the Act of 1922. The undivided family stands on the same footing as other taxable units. In my judgment there is no inconsistency, repugnancy or conflict between the provisions of Ss. 25, 25A and 26 of the Act. Each one of them deals with special subjects and does not in any way run counter to the other, though they all form part of a single scheme. For these reasons, I agree that the question referred be answered in the negative.

Khosla J. — The facts of this case are given in detail in the very lucid judgment of my learned brother Munir J. and need not be repeated here. The question referred to the Full Bench was "whether, on the facts of the case, the application of Sec. 25A (2) is a bar to the assessee's claim either under Section 25 (4) or Section 25 (3)." Sections 25 and 25A occur in Chapter 4, Income-tax Act. Chapter 4 deals with assessments and deductions, that is, the manner in which taxable income is to be assessed and the tax thereon recovered. A reading of the various sections in this Chapter shows that the scheme of the Act was intended to cover the various types of assessment that arise in actual practice. In this Chapter an answer is provided to the questions, who is to be assessed, for what period is the assessment to be made and from whom is the tax to be recovered. Directions for dealing with the case of a business which is discontinued or transferred and the case of a joint Hindu family after partition are set out. Upon a plain interpretation, it is seen that there is

nothing in S. 25A repugnant to S. 25 (4) of the Act. Section 23 describes in general terms the mode of assessment. This section applies to all assessee, whether the assessee be a firm or a Hindu undivided family. Sections 24, 24A and 24B deal with matters which are not relevant to the present enquiry. Section 25 deals with assessment in the case of a business which has been discontinued or transferred. Section 25A deals with assessment of a Hindu undivided family after it has been partitioned, and S. 26 covers the case of a change in the constitution of a firm.

A proper understanding of these sections will be facilitated by considering a few instances. The case of a firm which came into existence after 1918 does not present any difficulty, for to such a firm Ss. 25 (3) and (4) do not apply. Such a firm will be assessed under S. 23 and if it is discontinued or is transferred S. 25 (1) and (2) will cover the case. The case of a joint Hindu family business started after 1918 too does not involve complexity. Suppose, a joint Hindu family is partitioned in a certain year, then under the provisions of S. 25A the business will be taxed up to the date of its discontinuance and the tax will be recovered from various members. The family will be assumed to continue as joint for the purpose of assessment only. Now, consider the case of a business started before 1918. Suppose in a certain year X the business is discontinued. In this year an assessment for the previous year, that is, for the year X-1 will be made. Another assessment will be made for the broken period of the year X, that is, from the end of the year X-1 up to the date of discontinuance. Under the provisions of S. 25 (4), no tax is payable in respect of the broken period in the year X. Section 25 (4) further provides that if this tax of the broken period in the year X is less than the tax in the year X-1, the firm will be allowed a rebate. The case of a joint family business is to be treated in the same way. If the business is discontinued in the year X, the same method of assessment will apply and relief will be given under S. 25 (4). Now, supposing the joint family is partitioned and the business is, therefore, discontinued or transferred to one of its members and if this partition takes place in the year X, the mode of assessment will be exactly similar to the mode employed in assessing a firm. In this year the assessment for the year X-1 will be made under the provisions of S. 25A. Relief will be permissible under the provisions of S. 25 (4) in the same way as if the joint

4. (45) 32 A.I.R. 1945 P. C. 137 : 72 I. A. 196 : 49 C. W. N. 784 (P.C.), Commissioner of Income-tax v. P. E. Polson.

Hindu family business had been an ordinary business which was discontinued in the year X. In the year X-1, assessment will be made according to the provisions of S. 26.

Now, apply these principles to the facts of the present case. In the year 1941-42 the family was partitioned and an application under S. 25A, Income-tax Act, was made. The assessment for the previous year will be made as if the family were still undivided according to the provisions of S. 25A and the tax assessed will be recovered from the various members of the joint family. For the portion of the next year (18th April 1940-25th March 1941) an assessment will be made and relief will be given according to the provisions of S. 25 (4). There is nothing in S. 25A which is repugnant to the provisions of S. 25 (4). Section 25A merely provides the mode of assessing a joint Hindu family which has been partitioned. It does not cover the case of the relief permissible under S. 25 (4) which is confined to those firms which were taxed under the Income-tax Act of 1918. Section 25A covers the case of all joint Hindu families whether they were paying tax under the 1918 Act or not. The specific matter dealt with under S. 25 (4) not being inconsistent with the general topic of S. 25A, relief must be given under S. 25 (4). I would accordingly answer the question referred to the Full Bench in the negative.

D.H.

*Reference answered
in the negative.*

[Case No. 33.]

* A. I. R. (33) 1946 Lahore 158

FULL BENCH

ABDUL RASHID, SALE AND MUNIR JJ.

Mohd. Mohy-ud-Din for Burhan-ud-Din — Petitioner

v.

Emperor.

Criminal Misc. Case No. 1283 of 1945, Decided on 28th January 1946, referred by Munir J., D/- 7th January 1946.

(a) Constitutional law—Indian legislature — Powers of legislation, extent of.

It is well settled that the Indian Legislature is not a sovereign Legislature like the Imperial Parliament. Its powers are expressly limited by the Acts of Parliament which created it and it can do nothing beyond the limits which circumscribe these powers. But when the Indian Legislature is acting within these limits, it is not in any way an agent of the Imperial Parliament but has, and was intended to have, plenary powers of legislation as large and of the same nature as those of the Parliament itself: 4 Cal. 172 (P.C.), *Rel. on.*

[P 160 C 2]

(b) Interpretation of statutes — Words in later statutes cannot be construed by reference to their meaning in earlier statutes — But entire legislation on particular subject may be referred to (*Per Abdul Rashid J.*).

Words in a later enactment cannot ordinarily be construed with reference to the meaning given to those or similar words in an earlier statute. It is, however, permissible to refer to the entire legislation relating to a particular subject during a particular period to ascertain the meaning of those words. Thus, in order to ascertain the meaning of the expression 'native officers and soldiers' in S. 73, Government of India Act, 1833, it was permissible to refer to entire legislation relating to the Indian Army passed during the period of the East India Company's rule.

[P 164 C 1]

C. P. C. —

('44) Chitaley, Preamble N. 7.

(c) Government of India Act (1833), S. 73 — 'Native officers and soldiers', meaning of — Expression is used in ordinary racial sense in contradistinction to European officers and soldiers, and not in territorial sense.

The words 'native officers and soldiers' used in S. 73, Government of India Act, 1833, mean officers and soldiers belonging to non-European races in the military service of the East India Company. These words cover all the forces raised from coloured races, whether they resided in British India or in Indian States. The words have not been used in a territorial sense, but in a purely racial sense.

[P 164 C 2]

(d) Government of India Act (1833), S. 73 — Section not repugnant to S. 22, Indian Councils Act, 1861.

If an Act gives the Governor-General in Council power to frame laws and regulations with regard to a certain territory and also states that the provisions of an earlier Act which gives the Governor-General power to frame rules and regulations governing a much larger territory shall remain in force, the later provisions cannot be said to be repugnant to the former, simply because they enlarge the area of the operation of the laws which can be framed by the Governor-General in Council.

[P 165 C 2]

If Provisos 1 and 2 to S. 22, Indian Councils Act, 1861, are read together, it is clear that instead of re-enacting S. 73, Government of India Act, 1833, its operation was saved by them by stating that the provisions of the Government of India Act, 1833, shall not in any way be affected by the passing of the Indian Councils Act and shall remain in force. The substantive part and the two provisos of S. 22 are supplementary to each other and their combined effect is that so far as native officers and soldiers are concerned, the Governor-General has been given power to pass legislation with extra-territorial operation throughout the world. There is no repugnancy or inconsistency between S. 73 of the Act of 1833 and S. 22 of the Act of 1861.

[P 165 C 2; P 166 C 1; P 167 C 1]

* (e) Indian Army Act (1911), S. 41—Section not *ultra vires* of Indian Legislature in 1911 — Section applies to all native officers and soldiers, including a subject of native state, in or at any place beyond British India.

The *ultra vires* nature of the provisions of S. 41, Indian Army Act, 1911, cannot be determined by reference to S. 65 (1) (d), Government of

India Act, 1915. It must be determined in accordance with the provisions of S. 22, Indian Councils Act, 1861 and S. 73, Government of India Act, 1833. [P 168 C 1]

Section 73, Government of India Act, 1833, stood unrepealed till the passing of the Government of India Act, 1915. The Governor-General in Council, therefore, was competent to pass any legislation in 1911 in respect of the native officers and soldiers in or at any place beyond British India. Section 41, Indian Army Act, 1911, is not *ultra vires* of the Indian Legislature and can govern a native officer serving beyond British India even though he is a subject of a native state. [P 167 C 2]

(f) Indian Army Act (1911), Ss. 41, 69 to 71 and Penal Code (1860), Ss. 4 and 5—Subject of Indian State committing civil offence outside India as native officer — Case not triable by ordinary criminal Courts and hence outside Ss. 69 to 71, Army Act — Offence can be tried under S. 41, Army Act, that being special law within S. 5, Penal Code (Per *Abdul Rashid J.*).

Where a subject of an Indian State commits a civil offence outside British India in the capacity of a native officer in the army, the offence is not covered by S. 4, Penal Code, and as such, the person is not triable by the ordinary criminal Courts. For the same reason, Ss. 69 to 71, Indian Army Act, which relate to the adjustment of the jurisdiction of the Courts-martial and criminal Courts, would not apply to the case. But it cannot be contended that S. 41, Indian Army Act, would also be inapplicable for the same reason. The provisions of the Government of India Act, 1833, have been expressly saved by S. 5, Penal Code, and moreover, the Indian Army Act is a special law within the meaning of that section, governing persons enlisted in Indian forces. The provisions of S. 41 would, therefore, fully apply to the person. [P 169 C 1]

(g) Criminal P. C. (1898), S. 491 — Application under, by person charged with offences under Ss. 121 and 302, Penal Code, before Court-martial—Plea that provisions of S. 196, Criminal P. C., have not been complied with in respect of former charge cannot be raised.

Where a native officer charged of offences under Ss. 121 and 302, Penal Code, in a trial before a Court-martial applies for a writ of *habeas corpus* under S. 491, Criminal P. C., the plea that he cannot be tried for offence under S. 121, without presentation of complaint by a Provincial Government under S. 196, Criminal P. C., cannot be raised. As the applicant is also charged under S. 302, Penal Code, he can be kept in custody without any such complaint and the custody cannot be regarded as improper or illegal detention. [P 169 C 1; P 169 C 2]

Per *Salé J.* — The question of the applicability of S. 196, Criminal P. C., as indeed of the Criminal Procedure Code in general, to Court-martial proceedings is not a proper subject for investigation in application under S. 491, Criminal P. C. The Court is not sitting in appeal or revision from any finding of the Court-martial, but having been constituted to deal with an application under S. 491, is concerned solely with the question of legality of detention of the accused person for the purpose of trial by the Court-martial convened under the Indian Army Act. [P 170 C 1]

Cr. P. C. —

(41) Chitaley, S. 491, N. 7.

(h) Interpretation of statutes — Repugnancy with purview is no ground for giving go-bye to proviso (Per *Munir J.*).

While the scope of the purview cannot be enlarged by reference to the proviso, repugnancy with the purview alone is no ground for giving the go-bye to the proviso or not giving it full effect. Often the proviso is no more than an exception or a qualifying clause and in such a case there is *ex hypothesi* some repugnancy between the purview and the proviso. [P 174 C 2]

Sir Tek Chand, Badri Das, R. C. Soni, S. M. Sikri and S. K. Shastri — for Petitioner.

Sir N. P. Engineer, Advocate-General for India, and Basant Krishen Khanna, Advocate-General, Punjab — for the Crown.

Abdul Rashid J. — This is an application, under S. 491, Criminal P. C., praying that Burhan-ud-Din be released and set at liberty, on the ground that he is being illegally and improperly detained in custody by the military authorities in the Red Fort at Delhi. To appreciate the questions of law involved in this case, it is necessary to set out the facts in some detail. Burhan-ud-Din was born in Chitral on 11th January 1913. He is the brother of His Highness the Mehtar of Chitral and is a subject of that State. In the year 1934, Burhan-ud-Din joined the Indian Military Academy. In 1936 he was granted King's Commission in the Indian Army and was attached to 2-10 Baluch Regiment. In December 1941 he was detailed to go to Singapore as Japan had declared war and the Japanese Army had invaded Malaya. He arrived at Singapore on 4th February 1942 and fought with the British Forces against the Japanese until 13th February. On 15th February the British Commander surrendered to the Japanese, and on 17th February all the British and Indian Forces, including Burhan-ud-Din, were handed over by the British Commander to the Japanese. Shortly afterwards, Mohan Singh organised a Force which was known as the Indian National Army. A provisional Government of India was also formed and a number of governmental functions were entrusted to this Government by the Japanese. Burhan-ud-Din formally joined the Indian National Army and continued to serve under the provisional Government of India till May 1945. He was in command of the "Bahadur Group." On or about 3rd May 1945, a large part of the Indian National Army surrendered and Burhan-ud-Din, along with a large number of soldiers and other officers of the Indian National Army, was taken prisoner by the British and Indian Forces.

On 3rd November 1945, charges were framed against Burhan-ud-Din under S. 41,

Indian Army Act, 1911. He was charged with the committing of two civil offences, that is to say, waging war against the King contrary to S. 121, Penal Code, and murder contrary to S. 302, Penal Code. It was stated in the charge sheet that Burhan-ud-Din had waged war against the King at Singapore, at Batu Pahat and elsewhere in Malaya, and at Rangoon and at Pyinvshe Kala and elsewhere in Burma between the month of September 1942 and 3rd May 1945. It was further stated that he had committed murder of one Joga Singh at Rangoon in Burma on or about 5th February 1944. On 29th November 1945, Brigadier L. L. Thwaytes ordered that Burhan-ud-Din shall be tried by a General Court-martial at Delhi. On 3rd December, the Court-martial started proceedings and the following objections were raised on behalf of the accused: (1) That Burhan-ud-Din, not being a British Indian subject, could not be tried for offences alleged to have been committed beyond British India under the Indian Army Act or under any other law made by the Indian Legislature. If S. 41, Indian Army Act, purported to authorise trial of persons who were not British Indian subjects for offences committed outside British India, it was *ultra vires* of the Indian Legislature; (2) That the Court-martial could not take cognisance of an offence under S. 121, Penal Code, as no complaint had been presented by a Provincial Government in pursuance of the provisions of S. 196, Criminal P. C. The existence of a complaint by the Provincial Government was a necessary condition for initiation of proceedings under S. 121, Penal Code.

After hearing arguments, the President of the Court-martial announced that the Court was in doubt as to the validity of the objections raised on behalf of the defence and that the matter would be referred to the convening authority. After receiving the opinion of the convening authority, the objections were overruled by the Court-martial on 6th December 1945. The charges were read out to the accused who pleaded not guilty. One of the prosecution witnesses was then examined, and the case was adjourned for further proceedings to 27th December. Meanwhile, on 20th December, the present application for the issue of a writ of *habeas corpus* was presented to this Court. On 21st December, Mohammad Munir J. issued writs to the Adjutant General, India, and to the Commander, Red Fort, Delhi, directing them to produce Burhan-ud-

Din before this Court on 14th January 1946. On that day this case was placed before the present Full Bench for hearing. The State of Chitral comprising about 4500 square miles, is situate beyond the North-West Frontier Province of India. Up to the year 900 A. D., the inhabitants of Chitral were Buddhists and were under the sway of Jaipal, King of Kabul. Later on Chitral was attacked by Chingiz Khan and his Tartars and the history of the country is shrouded in mystery up to the sixteenth century. Sangin Ali was the ruler of Chitral in the middle of the sixteenth century and he died in the year 1570 leaving four sons, two of whom made themselves all-powerful, ousting the previous ruling dynasty. From the second son of Sangin Ali the present Mehtar's house is descended. The ruling dynasty has thus maintained itself on the throne for more than 300 years, during the greater part of which Chitral has been constantly at war with her neighbours. In 1854 the Maharaja of Kashmir made alliance with Shah Afzal, Mehtar of Chitral, against Gauhar Aman, the ruler of Yasin and Mastuj, who was invading Gilgit, a State tributary to Kashmir. In 1878 Chitral entered into an alliance with the Kashmir Darbar and recognised its suzerainty. Before 1911 the Mehtar of Chitral had recognised the suzerainty of His Majesty exercised through the Governor-General of India.

The principal point for determination in this petition is, whether it was open to the Indian Legislature to enact legislation in the year 1911 governing persons who were not British Indian subjects in respect of offences committed by them outside British India. It is well-settled that the Indian Legislature is not a sovereign Legislature like the Imperial Parliament. Its powers are expressly limited by the Acts of Parliament which created it and it can do nothing beyond the limits which circumscribe these powers. But when the Indian Legislature is acting within those limits, it is not in any way an agent of the Imperial Parliament but has, and was intended to have, plenary powers of legislation as large and of the same nature as those of the Parliament itself. This was laid down by their Lordships of the Privy Council in 4 Cal. 172.¹ The Indian Army Act was passed by the Indian Legislature in 1911. The legislative powers of the Indian Legislature at that time were determined by the

1. ('78) 4 Cal. 172 : 5 I. A. 178 : 3 A. C. 889 : 3 Sar. 834 : 3 Suther 556 (P. C.), *Empress v. Burah*.

provisions of S. 22, Indian Councils Act, 1861, which may be reproduced *in extenso* :

"22. The Governor-General in Council shall have power at meetings for the purpose of making laws and regulations as aforesaid, and subject to the provisions herein contained, to make laws and regulations for repealing, amending or altering any laws or regulations whatever now in force or hereafter to be in force in the Indian territories now or hereafter under the dominion of Her Majesty, and to make laws and regulations for all persons, whether British or native, foreigners or others, and for all Courts of justice whatever, and for all places and things whatever within the said territories, and for all servants of the Government of India within the dominions of princes and states in alliance with Her Majesty; and the laws and regulations so to be made by the Governor-General in Council shall control and supersede any laws and regulations in anywise repugnant thereto which shall have been made prior thereto by the Governors of the Presidencies of Fort Saint George and Bombay respectively in Council, or the Governor or the Lieutenant Governor in Council of any Presidency or other territory for which a Council may be appointed, with power to make laws and regulations, under and by virtue of this Act : Provided always, that the said Governor-General in Council shall not have the power of making any laws or regulations which shall repeal or in any way affect any of the provisions of this Act :

Or any of the provisions of the Government of India Act, 1833, and of the Government of India Act, 1853, and of the Government of India Act, 1854, which after the passing of this Act shall remain in force :

It is obvious that S. 73, Government of India Act, 1833, was not only not repealed, but was expressly kept alive by the second proviso to S. 22. Section 73, Government of India Act, 1833, runs in the following terms :

"73. It shall be lawful for the said Governor-General in Council from time to time to make articles of war for the government of the *native officers and soldiers* in the military service of the company, and for the administration of justice by Courts Martial to be holden on such officers and soldiers, and such articles of war from time to time to repeal or vary and amend; and such articles of war shall be made and taken notice of in the same manner as all other the laws and regulations to be made by the said Governor-General in Council under this Act, and shall prevail and be in force, and shall be of exclusive authority over all the native officers and soldiers in the said military service, to whatever Presidency such officers and soldiers may belong, or *wheresoever they may be serving* : Provided nevertheless, that until such articles of war shall be made by the said Governor-General in Council, any articles of war for or relating to the government of the company's native forces, which at the time of this Act coming into operation shall be in force and use in any part or parts of the said territories, shall remain in force."

It was strenuously contended by Sir Tek Chand that "native officers and soldiers" referred to in S. 73 meant native officers and soldiers in the military service of the Company, being inhabitants of the three Presidencies of Bengal, Bombay and Madras. The

word 'native', according to the learned counsel, was not used in a racial sense and it could not apply to Indians residing in the various states governed by Indian Princes. In 1833 and 1861 Chitral was an absolutely independent sovereign state and an inhabitant of Chitral could not be covered by the words "native officers and soldiers." On the other hand, it was urged by the learned Advocate-General that the words "native officers and soldiers" were applicable to all non-European officers and soldiers of His Majesty's forces in the years 1833 and 1861. It was maintained that the words "native officers and soldiers" were used to distinguish the non-European forces from the British forces which consisted of Europeans only.

In order to determine the meaning of the words "native officers and soldiers" as used in the Government of India Act, 1833, it is necessary to give a short history of the legislation relating to the Indian Army. The East India Company was formed in the year 1600. Queen Elizabeth granted a Royal Charter to 215 English knights, aldermen and burgesses headed by George, Earl of Cumberland, to carry on trade in the territories and islands between the Cape of Good Hope and the Straits of Magellan. The East India Company was given a monopoly of the English trade with the East Indies, in the countries and islands in Asia, and parts of Africa and other territories situate between the Cape of Good Hope and the Straits of Magellan. By means of the Royal Charter, the East India Company was given power to frame laws, constitutions, orders and ordinances to govern the conduct of its servants. The Company was authorised to award sentences of fine and imprisonment to its servants so long as they were reasonable and were not contrary or repugnant to the laws, statutes or customs of England. The point that was emphasized by Sir Tek Chand was that the Company was formed with the sole purpose of carrying on trade with the East Indies and that it had no power to acquire territories or to take their administration in hand. Another Charter was granted to the Company in the reign of William the Third in the year 1698. At this time also the Company was a purely trading concern and it had no power to acquire any territories or to administer them. By means of the East India Company Act, 1793, a new Charter was granted to the Company for a period of 20 years. The monopoly of the East India Company in respect of trade was maintained. The territorial acquisitions of

the Company, with the revenues of the territory, were to continue in the possession of the East India Company for a period of 20 years. The next East India Company Act was passed in the year 1813. By means of this Act, the monopoly of the East India Company in respect of trade with the East Indies and the territories within the limits of its Charter was taken away. The East India Company was given a monopoly of trade with China for a period of 20 years and in respect of tea only. The former territorial acquisitions in India with late acquisitions on the Continent of Asia, or in any islands situate to the north of the Equator, were allowed to continue in the government of the East India Company for a further period of 20 years. It is important to refer to ss. 96 and 97 of this Act as particular emphasis was laid on the terms of these sections by the learned Advocate-General in support of his argument that the words "native officers and soldiers" in the Government of India Act, 1833, meant officers and soldiers who were inhabitants of the East Indies, or of any territories within the limits of the Charter of the East India Company. The opening words of S. 96, Government of India Act, 1813, are in the following terms :

"And whereas doubts have been entertained whether the several Governments of the said Company have sufficient power in all cases to make laws and regulations and articles of war for the order and discipline of officers and soldiers being natives of the East Indies or other places within the limits of the said Company's Charter in service of the said Company and for the administration of justice by Courts-Martial to be holden upon such officers and soldiers; and it is expedient that such doubts should be removed : be it, therefore, enacted and declared that the several governments of Fort William, Fort Saint George and Bombay, have and shall during the continuance of the terms hereby granted to the said Company, be deemed and taken to have full power and authority to make all such laws and regulations and articles of war as they may think fit for the order and discipline of all officers and soldiers, natives of the East Indies, or other places within the limits of the Company's Charter, in the respective services, and for the administration of justice by Courts-Martial to be holden on such native officers and soldiers, . . ."

By S. 97 former laws, articles of war and established usages respecting native troops were confirmed. The Act of 1813 was to continue only till April 1834. It became, therefore, necessary in 1833 to pass the Government of India Act, 1833, S. 73 of which gave the Governor-General power to make rules and regulations in respect of "native officers and soldiers in the military service of the Company *wheresoever they*

may be serving." It was maintained by Sir Tek Chand on behalf of the accused that the words "natives of the East Indies and other territories within the limits of the Company's Charter" were used in the Act of 1813, as the Company was exercising certain rights with respect to trade in the East and had also to discharge governmental functions in respect of the territories that it had acquired in the three Presidencies. By the Government of India Act, 1833, all the privileges of the East India Company with respect to trade with the East Indies were taken away. A certain sum from the revenues of India was payable to the East India Company as dividend on their investment. The Government of India Act, 1833, was an Act for effecting an arrangement with the East India Company and for the better government of His Majesty's Indian territories till 13th April 1854. The words "natives of the East Indies and of territories within the limits of the Company's Charter" do not occur in the Government of India Act, 1833. It was urged by Sir Tek Chand, therefore, that this omission was deliberate and was necessitated by the fact that the activities of the East India Company had changed from that of a trading concern to that of an administrative body which was in charge of the government of extensive territories. According to the learned counsel, the change in the phraseology was deliberate and the words "native officers and soldiers" could not, therefore, have the same meaning as the words "natives of the East Indies and territories within the limits of the Company's Charter." Section 39, Government of India Act, 1833, enacted that the superintendence, direction and control of the whole civil and military government of all the said territories and revenues in India shall vest in a Governor-General and Counsellors, to be styled "The Governor-General of India in Council." "The said territories" in this section meant His Majesty's Indian territories as mentioned in the preamble of the Act. By S. 43 of the Act, the Governor-General in Council was given power to make laws and regulations governing all the inhabitants of the territories under the control of the Company and for establishing Courts of justice. The Governor-General in Council could not, however, make any laws or regulations to repeal, vary, suspend, or affect any of the provisions of the Government of India Act, and with respect to certain matters mentioned in S. 43. This section generally dealt with laws and regu-

lations applicable to all persons, except the members of the Army. That is why the operation of this section was limited to the "said territories," i. e., territories referred to in the preamble. Section 73 of the Act, which has already been reproduced in an earlier part of this judgment, gave the Governor-General in Council power to make rules and regulations to govern all native officers and soldiers in the military service of the Company wheresoever they may be serving. In respect of the native officers and soldiers, the Governor-General was given power to frame laws and regulations having extra-territorial operation. The words "to whatever Presidency such officers and soldiers may belong" were inserted as at the time there were three armies, one belonging to each of the three Presidencies. As the Governor-General was given power to frame laws and regulations for the whole of the army, it was necessary to insert these words. It cannot, however, be said that the words "native officers and soldiers" were governed by the words "to whatever Presidency such officers and soldiers may belong."

In the year 1840, an Act was passed (3 and 4 Vict. Chap. 37) to consolidate and amend the laws for punishing mutiny and desertion of officers and soldiers in the service of the East India Company, and for providing for the observance of discipline in the Indian Navy. It was enacted by S. 7 of this Act that it was lawful for Her Majesty to make articles of war for the better government of the said Company's Forces, which articles of war shall be judicially taken notice of by all Judges and in all Courts whatsoever; provided that nothing in the Act shall in any manner impeach or affect any articles of war, or any matters enacted or in force, or which hereafter may be enacted by the Government of India, respecting officers or soldiers being natives of the East Indies, or other places within the limits of the Company's Charter, and to whom the present Act was not to be applicable. It appears to be obvious that after the passing of 3 and 4 Vict., the European Forces of Her Majesty were to be governed by the articles of war to be made by Her Majesty, but the "Native Forces" of the East India Company were to be governed by the articles of war which had already been framed respecting officers and soldiers, being natives of the East Indies or other places within the Company's Charter or which were hereafter to be enacted by the Government of India. The only provision

relating to India under which articles of war could be framed, which was in operation at the time, was S. 73, Government of India Act, 1833. Obviously, in enacting S. 7 of 3 and 4 Vict. Chap. 37, the Parliament was referring to the Government of India Act, 1833, which authorised to the Governor-General in Council to frame laws and regulations governing native officers and soldiers.

Sir Tek Chand contended strenuously that it was not permissible to refer to the wording of the East India Company Act, 1813, in order to discover the true meaning and import of the words "native officers and soldiers," as used in S. 73, Government of India Act, 1833. It was urged with great insistence that the East India Company Act, 1813, was passed at a time when the Company was still carrying on its trading activities on an extensive scale not only with East Indies but also with China, that in the year 1833 its trading activities were brought to an end and the Company became a governing body solely connected with the administration of the territories that it had acquired. The words "natives of East Indies and of territories within the limits of the Company's Charter" were not repeated in the Act of 1833. It was urged that the omission was deliberate as it was intended that the Governor-General should only frame laws and regulations for the troops raised in the three Presidencies from amongst the inhabitants thereof. It was maintained that words occurring in a statute passed for a specific purpose and under a particular set of circumstances could not be imported into a subsequent enactment when a radical change had taken place in the activities of the East India Company. Reliance was placed in this connection on the case in (1893) 3 Ch. 252² at page 266 where it was observed by A. L. Smith L. J. that

"it was not the right way to construe an Act of Parliament passed in 1882 for a specific purpose, and which constitutes a code by itself, to go back to an Act which was passed forty years before for another purpose altogether such as the Lands Clauses Consolidation Act."

With respect to the Act passed in 1840 for punishing mutiny and desertion (3 and 4 Vict. Chap. 37), it was maintained that this Act was not explanatory of any expressions used in the Government of India Act, 1833. This Act gave power to Her Majesty to frame articles of war and merely stated that such articles of war shall not affect any

2. (1893) 3 Ch. 252 : 63 L. J. Ch. 23 : 69 L. T. 393, *In re Lord Gerard's Settled Estate*.

articles of war framed by the Government of India or which may hereafter be enacted by that Government for native employed in the East Indies or territories subject to the Company's Charter. Reliance was placed in this connection on the case in (1859) 141 E. R. 350³ at page 422. The learned counsel urged that the saving clause in the Act of Parliament may be due to a misapprehension as to the state of the law on the part of the Legislature. The following observations from the reported case may be reproduced with advantage :

"I quite concur in the argument that a mistake as to the state of the law on the part of the Legislature in a private Act of Parliament,—nay, I may say, upon the authority of the case to which Mr. Grant, as *amicus curiæ*, was good enough to direct our attention yesterday, even in a public Act,—and legislation founded on such mistake, would not have the effect of making that the law which the Legislature had erroneously assumed to be so. If, therefore, the 8th section and the restraint imposed by it had been removed by the general legislation of the 10. G. IV, I agree that the clause of the private Act of the 6 and 7 Vict. would not have the effect of renewing the disability."

I agree with the learned counsel for the accused that words in a later enactment cannot ordinarily be construed with reference to the meaning given to those or similar words in an earlier statute. In my opinion, however, it is permissible to refer to the entire legislation relating to the Indian Army passed during the period of the Company's rule to show that the forces of the Company were always divided into two categories, the first category consisting of "European Forces" and the second category consisting of "Native Forces," and that while power to frame articles of war for the European Forces was jealously reserved for Her Majesty, the power to frame articles of war for the Native Troops was given to the Governor-General in Council. It was in order to establish that the Indian Army during the period of the Company's rule was divided into two categories mentioned above that the learned Advocate-General referred to ss. 96 and 97, East India Company Act, 1813, and to s. 7 of 3 and 4 Vict. Chap. 37. The words "natives of the East Indies or other places within the limits of the Company's Charter" were placed in a special category by 3 and 4 Vict. Chap. 37 and it was stated that that Act was not to be applicable to them, but that they were to be governed by any articles of war framed by the Government of India or which may hereafter be enacted by the Government of India. It is

3. (1859) 141 E. R. 350 : 29 L. J. C. P. 34, *Earl of Shrewsbury v. James Robert Hope Scott*.

significant that in the East India Company Act of 1813, which was passed twenty years before the Government of India Act of 1833, and in 3 and 4 Vict., Chap. 37, which was passed seven years after the said Government of India Act, 1833, officers and soldiers who were natives of the East Indies and other places within the limits of the Company's Charter were placed in a special category in order to distinguish them from the European officers and soldiers in the Company's service. The dictionary meanings of the word "native" are also instructive. According to the Oxford Dictionary, a native of a place means a person born in a particular place, i. e., one connected with a place by birth, whether subsequently resident there or not. Legally, a person is a native of the place or country where the parents have their domicile, which may or, may not be the place of actual birth. Amongst a large number of other meanings, however, the Oxford Dictionary contains the following meanings of the word 'native' : (1) A person belonging to a non-European and imperfectly civilized race ; (2) A coloured person ; (3) Born in a particular place or country ; belonging to a particular race, district, etc., by birth. In modern use specially with connotation of non-European.

In Webster's Dictionary, amongst other meanings, it is stated that the word "native" is chiefly used of non-Caucasian people, as the native troops of the British Indian Army. After careful consideration of the entire legislation relating to the Indian Army during the period of the Company's rule, I have reached the conclusion that the words "native officers and soldiers" as used in s. 73, Government of India Act, 1833, mean officers and soldiers belonging to non-European races in the military service of the Company. These words would cover all the forces raised from coloured races, whether they resided in British India or in Indian States. Western Africa was not a territory within the limits of the Company's Charter. If members of any coloured race from Western Africa had joined the military forces of the Company, they would have been included within the words "native officers and soldiers." The words "native officers and soldiers," in my opinion, have not been used in a territorial sense, but in a purely racial sense. As I have stated above, this is evident from the fact that throughout the period of the Company's rule, the forces of the Company were divided into two categories, i. e., the European Forces and the Native Forces.

One of the principal arguments of Sir Tek Chand was that if S. 73, Government of India Act, 1833, authorised the Governor-General in Council to make articles of war governing the conduct of persons who were not British Indian subjects for acts committed outside British India, such a provision was repugnant to S. 22, Indian Councils Act, 1861, and, therefore, stood repealed to that extent by the substantive part of S. 22 and also by the operation of the first two provisos of S. 22. As I read S. 73 of the Act of 1833, and S. 22 of the Act of 1861, I cannot discover any repugnancy or inconsistency between these two provisions of law. Section 43, Government of India Act, 1833, authorised the Governor-General to enact legislation for the inhabitants of the territories under the rule of the Company and for the servants of the Company, except that the Governor-General could not pass any law or regulation which had the effect of repealing that Act and any of the provisions of the Act for punishing mutiny and desertion of officers and soldiers. Section 73 of this Act specifically dealt with the native officers and soldiers in the service of the Company. By means of S. 2, Indian Councils Act, 1861, S. 43, Government of India Act, 1833, was repealed. It was enacted in S. 2 that all other enactments in force in 1861, whether framed by the Council of the Governor-General of India, or the Councils of the Governors of the respective Presidency of Fort St. George and Bombay, shall continue in force; save so far as the same were altered by or were repugnant to the Indian Councils Act. Section 73 which related to the framing of the articles of war regarding native officers and soldiers was not repealed by S. 2, Councils Act, 1861. It is obvious that the Imperial Legislature in 1861 did not regard S. 73, Government of India Act, 1833, as in any way repugnant to the provisions of Indian Councils Act, 1861.

The provisions contained in the repealed S. 43 of the earlier Act were re-enacted with certain modifications in the substantive part of S. 22 of the later Act. The power of the Governor-General in Council to frame articles of war was maintained by laying down in a proviso to S. 22 of the later Act that the provisions of the Government of India Act, 1833, shall remain in force after the passing of the Indian Councils Act of 1861. There was, therefore, no express repeal of S. 73 of the earlier Act by any of the provisions of the later Act. It was contended strenuously, however, that S. 22, Indian Councils Act, gave power to the Governor-General in

Council to enact legislation having inter-territorial operation so far as the inhabitants of British India were concerned. With respect to the servants of the Government of India, it gave the Governor-General power to frame laws governing Government servants in British India and in the dominions of Princes and States in alliance with Her Majesty. It was urged that native officers and soldiers would be servants of the Government of India and, therefore, the Governor-General had power to frame laws and regulations which would govern them in their activities in British India and in the dominions of Princes and States in alliance with Her Majesty. Section 73 of the earlier Act gave the Governor-General in Council power to make articles of war for the government of native officers and soldiers wheresoever they may be serving. As the later Act gave extra-territorial jurisdiction to the Governor-General only in the dominions of Princes and States in alliance with Her Majesty and S. 73 gave the Governor-General in Council power to frame articles of war to govern the conduct of military servants of the country wheresoever they may be serving in the world, S. 73 of the earlier Act was inconsistent with S. 22 of the later Act as it enlarged the powers of the Governor-General unduly in framing articles of war which could be applicable to native officers and soldiers wheresoever they may be serving.

In my opinion, this contention is wholly without force. If Provisos 1 and 2 to S. 22 are read together, it is clear that instead of re-enacting S. 73, Government of India Act, 1833, its operation was saved by stating that the provisions of the Government of India Act, 1833, shall not in any way be affected by the passing of the Indian Councils Act and shall remain in force. If an Act gives the Governor-General in Council power to frame laws and regulations with regard to a certain territory and also states that the provisions of an earlier Act which gives the Governor-General power to frame rules and regulations governing a much larger territory shall remain in force, the later provisions cannot be said to be repugnant to the former, simply because they enlarge the area of the operation of the laws which can be framed by the Governor-General in Council. The provisions of the substantive part of S. 22 and the provisions of the two provisos to that section are supplementary to each other, and their combined effect is that so far as native officers and soldiers are concerned, the Governor-General has been given

power to pass legislation with extra-territorial operation throughout the world. As regards the inhabitants of British India, he has been given power to pass legislation with inter-territorial effect only. As regards the servants of the Government of India, S. 22 authorised the Governor-General in Council to pass legislation having inter-territorial effect and extra-territorial effect so far as the dominions of Princes and States in alliance with Her Majesty were concerned. If Ss. 2 and 22, Indian Councils Act of 1861, are read together, the position becomes perfectly clear. In my opinion, therefore, no part of S. 73 has been repealed, expressly or by necessary implication, by any of the provisions of the Indian Councils Act of 1861. It was contended by Sir Tek Chand that the proviso to a section cannot enlarge the operational extent of an Act, and that as the provisions of the Government of India Act, 1833, were only saved by Proviso 2 to S. 22, Indian Councils Act, 1861, it must be held that the provisions of the former Act in so far as they gave power to the Governor-General to legislate with extra-territorial operation outside India stood repealed. Reference was made in this connection to the case in (1897) A. C. 647⁴ at page 652. The learned counsel relied on the following passage in the judgment of Lord Watson:

"But I can only say for myself that, laying out of sight the words of the proviso, I cannot discover any language in S. 2 which either expressly or by reasonable implication confers any such power as against an unwilling creditor upon the Local Government Board.

Now that being so, what is the meaning of the proviso? I have not been able to satisfy my own mind that it can be read or ought to be read in the sense suggested by Rigby L. J., which has met with the approval of my noble and learned friend the Lord Chancellor; but I am perfectly clear that if the language of the enacting part of the statute does not contain the provisions which are said to occur in it, you cannot derive these provisions by implication from a proviso. When one regards the natural history and object of provisos, and the manner in which they find their way into Acts of Parliament, I think your Lordship would be adopting a very dangerous and certainly unusual course if you were to import legislation from a proviso wholesale into the body of the statute, although I perfectly admit that there may be and are many cases in which the terms of an intelligible proviso may throw considerable light upon the ambiguous import of the statutory words."

In the reported case the proviso was not of a nature which kept previous legislation alive expressly. Certain powers which had not been given to certain authorities by the

substantive part of the statute were claimed by implication from a proviso. In these circumstances, it was held that it would be dangerous if one were to import legislation from a proviso wholesale into the body of the statute. The provisions of the Government of India Act, 1833, have been expressly saved by S. 22, Indian Councils Act, 1861. The effect of the proviso is to re-enact S. 73, Government of India Act, 1833, as a substantive provision in the Indian Councils Act. Reading the substantive part of S. 22 and the two provisos together, there is no escape from the conclusion arrived at above. The fact that the provisions of the Government of India Act, 1833, relating to the "native officers and soldiers" stood unrepealed up to the passing of the Government of India Act, 1915, is evident from the following observations in Halsbury's Laws of England, Vol. X, p. 596, 1909 Edition:

"Subject to the supreme authority of the Crown, exercised by the Secretary of State, the superintendence, direction, and control of the whole military Government in India is vested by statute (Government of India Act, 1833) in the Governor-General in Council.

The army in India consists of two separate forces: British or European troops, and native troops. The former are under the Army Act, 1881, and are in precisely the same position as British troops stationed in other parts of the Empire, except as regards pay, equipment, etc. The native troops, on the other hand, are subject to the Indian Articles of War contained in Acts of the Indian Legislature, which were passed under powers conferred by Parliament."

Reference may also be made in this connection to Para. 63 of Ilbert's Government of India. It is stated in the 1898 edition that the Governor-General in Council has power to make laws:

(a) for all persons, for all Courts and for all places and things within British India;

(b) for all British subjects of Her Majesty and servants of the Government of India within other parts of India; and

(c) for all native Indian officers, soldiers, or followers in Her Majesty's Indian forces in any part of the world.

Section 73, Government of India Act, 1833, has been referred to in connection with laws governing native Indian officers and soldiers in any part of the world. It is stated in Carnduff's Military Law, p. 9, that by S. 73, Government of India Act, 1833,

"the Governor-General in Council was empowered to make articles of war for the government of the native officers and soldiers in the military service of the company, and for the administration of justice by Courts-Martial to be holden on such officers and soldiers; and it was further provided that such articles of war should prevail and be in

4. (1897) 1897 A. C. 647 : 66 L. J. Ch. 726 : 77 L. T. 284, *West Derby Union v. Metropolitan Life Assurance Society*.

force, and should be of exclusive authority, over all native officers and soldiers in the said military service, to whatever presidency they might belong and wheresoever they might be serving. The Indian articles so made are thus given by Parliament, as far as they go, an exclusive and extra-territorial operation, with which no Act of the Governor-General in Council could have invested them."

In view of the considerations indicated above I am of the opinion that S. 73, Government of India Act, 1833, is not repugnant to or inconsistent with any of the provisions of the Indian Councils Act, 1861, and that it stood unrepealed till the passing of the Government of India Act, 1915. Under the Government of India Act, 1833, the Council of the Governor-General consisted of four Councillors as ordinary members and the Commander-in-Chief. Articles of war under S. 73, Government of India Act, could be framed by the Governor-General at a meeting of the Councillors at which the Governor-General and at least three of the ordinary members of the Council were to be present. Under the Indian Councils Act of 1861, the Governor-General had to appoint not less than six and not more than twelve members to be members of the Council for the purpose of making laws and regulations only. These members were not entitled to sit or vote at any meeting of the Council except at meetings held for legislative purposes.

It was contended by Sir Tek Chand that even if S. 73, Government of India Act, 1833, was kept alive by S. 22, Indian Councils Act, 1861, legislation with respect to the Army could only be passed by the Governor-General and the ordinary members of his Council and that the legislative members could not take part in framing articles of war. The learned counsel urged that as the Indian Army Act was passed by the Governor-General in Council with the assistance of the legislative members, the Indian Army Act could not be regarded as having been enacted in a proper manner. I cannot agree with the submission made by the learned counsel. The effect of S. 22, Indian Councils Act, 1861, was to re-enact S. 73, Government of India Act, 1833. If S. 73 be regarded as an integral part of the Indian Councils Act, 1861, the Governor-General in Council shall mean the Governor-General in Council for the purposes of making laws and regulations. The articles of war referred to in S. 73, Government of India Act, 1833, are on the same footing as laws and regulations mentioned in S. 22, Indian Councils Act. That is why it has been stated in S. 73 of the earlier

Act that such articles of war shall be made and taken notice of in the same manner as all *other laws and regulations*. The articles of war are passed as Acts of the Legislature, Indian articles of war were framed by various Acts of the Governor-General in Council as Act 12 [XII] of 1891, Act 12 [XII] of 1904, Act 1 [I] of 1900, Act 13 [XIII] of 1904 and Act 5 [V] of 1905. Under S. 73 the articles of war were to be framed by the Governor-General in Council. By the re-enactment of that section in 1861, power was given to the Governor-General in Council to frame articles of war for native officers and soldiers. The Indian Army Act, 1911, was enacted by the Governor-General in Council in pursuance of the powers given to the Indian Legislature by S. 22, Indian Councils Act, 1861. The Governor-General in Council means the Governor-General and the Council as constituted from time to time in accordance with law. If a number of additional members are appointed as members of the Governor-General's Council for legislative purposes, they together with the ordinary members and the Governor-General constitute the "Governor-General in Council" for the time being. The body so constituted is entitled to pass legislation relating to the Indian Army under S. 22, Indian Councils Act, which kept S. 73, Government of India Act, 1833, alive for legislative purposes. The objection that the Indian Army Act should have been passed by the Governor-General only with the assistance of the ordinary or executive members of his Council and that the additional members of the Governor-General's Council were not entitled to take part in the enactment of the Indian Army Act is without force and must be repelled. I would, therefore, hold that S. 41, Indian Army Act, was not *ultra vires* of the Indian Legislature in the year 1911, and that it governed all native officers and soldiers in British India or at any place beyond British India. (The words "Native Indian Forces" were originally used in the Indian Army Act, 1911, but the word "native" was deleted by the Indian Army (Amendment) Act, 1918.)

It was contended by the learned Advocate-General that even if it be held that S. 41, Indian Army Act, was *ultra vires* of the Indian Legislature so far as it purported to authorise trial of persons who were not British Indian subjects for offences committed outside British India in the year 1911, this section had been validated by the Indian Legislature in this respect by subsequent legislation. It was urged that S. 41 was

amended by the Indian Legislature by the Indian Army (Amendment) Act, 1934. The words "either within British India or" were inserted in the opening clause of S. 41 and the words "or when on active service in British India" were deleted by the amending Act. The operation of S. 41 was thus considerably widened. The amendments made in 1934 amounted to a practical re-enactment of Sec. 41. In 1934 the powers of the Indian Legislature to legislate in respect of the Indian Army were defined by S. 65 (1)(d), Government of India Act, 1915, which lays down that the Governor-General in Council has power to make laws for Government officers, soldiers and followers in His Majesty's Indian Forces wherever they are serving in so far as they are not subject to the Army Act. In 1934, therefore, the Governor-General in Council could make laws for persons who had enlisted in His Majesty's Forces in respect of acts committed by them outside British India. In my opinion, this contention is untenable. Section 41 as it was enacted in 1911 had given extra-territorial jurisdiction to Courts-Martial constituted under that Act. The words "at any place beyond British India" existed in S. 41 before the amendments of 1934. In respect of extra-territorial operation no amendment was made in S. 41 in the year 1934. The *ultra vires* nature of the provisions of S. 41 cannot, therefore, be determined by reference to S. 65 (1) (d), Government of India Act of 1915. It must be determined in accordance with the provisions of S. 22, Indian Councils Act of 1861 and S. 73, Government of India Act, 1833. The amendments of 1934 cannot be regarded as a re-enactment of S. 41, Indian Army Act, regarding extra-territoriality.

The learned Advocate-General further submitted that as certain adaptations had been made in the Indian Army Act in pursuance of the provisions of S. 293, Government of India Act, 1935, no objection can now be taken to the provisions of S. 41 on the ground that it is inapplicable to the cases of persons who are not British Indian subjects in respect of acts committed by them outside British India. Reference was made in this connection to the case in 1 F. C. R. 124.⁵ In the reported case the question for consideration was whether S. 106, Cantonments Act, 1924, was *ultra vires* of the Indian

Legislature and was, therefore, not a law in force in British India when Part III, Constitution Act, came into operation. Certain amendments had been made in S. 106, Cantonments Act, by the Government of India (Adaptation of Indian Laws) Order, 1937, whereby the whole of para. (c) of S. 106 had been omitted. This provision related to the crediting of fines to the Cantonment Fund. By omitting this provision all fines imposed for breaches of the criminal law under the new constitution came to be credited to provincial revenues. This could only be done by making the necessary adaptations in S. 106, Cantonments Act of 1924. It is clear that in the reported case substantial and operative amendments had been made by the Adaptation Order so far as S. 106, Cantonments Act, was concerned. In the present case, only formal adaptations have been made in S. 41, Indian Army Act, by the Adaptation Order of 1937. In these circumstances, it cannot be held that S. 41 has been validated by the Adaptation Order in so far as its extra-territorial operation is concerned. Reference may be made in this connection to a decision of a Full Bench of this Court in A.I.R. 1941 Lah. 182,⁶ where it was laid down that all that S. 293 enacts is a power given to His Majesty in Council to adapt Acts already in force to bring them into accord with the provisions of the Government of India Act. Section 293 does not mean that if His Majesty has made any formal or consequential amendments in any Act, then that Act *ipso facto* becomes valid even though its provisions conflict with the provisions of the Government of India Act. It was further held by a Division Bench of this Court in 24 Lah. 461⁷ that there was no force in the contention that as His Majesty had by Order in Council made certain adaptations in the Punjab Pre-emption Act, the Act must be taken to have been validated in its entirety under the provisions of S. 293, Government of India Act, and that its alleged repugnance to S. 293, Government of India Act, would no longer affect its validity. The adaptations made in S. 41, Indian Army Act, do not, therefore, validate the provisions contained in this section with respect to extra-territoriality, if such provisions were not valid at the time when the Indian Army Act was enacted in 1911.

5. ('39) 26 A.I.R. 1939 F. C. 58 : I.L.R. (1939) Kar. F. C. 98 : (1939) 1 F. C. R. 124 : 180 I. C. 863 (F.C.), United Provinces v. Governor-General in Council.

6. ('41) 28 A.I.R. 1941 Lah. 182 : 195 I. C. 17 (F.B.), Punjab Province v. Daulat Singh.

7. ('43) 30 A.I.R. 1943 Lah. 233 : I. L. R. (1943) 24 Lah. 461 : 209 I. C. 296, Sajawal Bakhsh v. Mohammad Hussain.

Sir Tek Chand contended that the scheme of the Indian Army Act shows that so far as civil offences are concerned, it was intended to apply to persons who were triable by the ordinary criminal Courts, and as Burhan-ud-Din was not triable by the ordinary criminal Courts of the country in respect of offences committed by him outside British India, he was not triable by Court-martial under S. 41, Indian Army Act. Reference was made in this connection to S. 4, Penal Code, which lays down that the provisions of the Code apply to any offence committed by: (1) any Native Indian subject of Her Majesty in any place without and beyond British India; (2) any other British subject within the territories of any Native Prince or Chief in India; and (3) any servant of the Queen, whether a British subject or not, within the territories of any Native Prince or Chief in India.

As S. 4, Penal Code, would not cover any of the offences alleged to have been committed by Burhan-ud-Din in Malaya and Burma, he was not triable in the ordinary criminal Courts, and, therefore, the provisions of Ss. 69 and 70, Indian Army Act, could not be made applicable to him. Section 5, Penal Code, lays down that nothing in this Act is intended to repeal, vary, suspend, or affect any of the provisions of the Statute 3 and 4 William IV, Chap. 85, or of any Act of Parliament passed after that Statute in anywise affecting the East India Company, or the said territories, or the inhabitants thereof; or any of the provisions of any Act for punishing mutiny and desertion of officers, soldiers, airmen or sailors in the service of Her Majesty or of any special or local law. The provisions of the Government of India Act, 1833, have been specially saved by S. 5, Penal Code. Moreover, the Indian Army Act is a special law governing persons who have enlisted in the Indian Forces. Sections 69 to 71, Indian Army Act, relate to adjustment of the jurisdiction of the Courts-martial and criminal Courts. As Burhan-ud-Din is not triable by the ordinary criminal Courts in respect of offences alleged to have been committed by him in Burma, Ss. 69 to 71 have no applicability to his case at all. The provisions of S. 41, therefore, remain fully applicable to him.

It was contended, on behalf of the accused, that he cannot be tried for an offence under S. 121, Penal Code, without the presentation of a complaint by a Provincial Government, under the provisions of S. 196, Criminal P. C. After hearing lengthy arguments on this

point, we came to the conclusion that this question does not arise at the present stage. In an application for a writ of *habeas corpus* we have to determine whether Burhan-ud-Din is being illegally or improperly detained. A charge under S. 302, Penal Code, has also been preferred against him. This charge is triable without the presentation of any complaint by the Provincial Government. He can be kept in custody for the offence of murder triable under S. 41, Indian Army Act, and such custody cannot be regarded as improper or illegal detention. It would be open to the accused, if so advised, to raise this point before the Court-martial.

The learned Advocate-General contended that if the accused is not triable under S. 41, Indian Army Act, he is triable by a Court-martial under the provisions of the Indian Army Act, 1881. In view of my finding that Burhan-ud-Din is triable under S. 41, Indian Army Act, in respect of offences committed by him in Malaya and Burma, the question of the applicability of the English Army Act does not arise.

For the reasons given above, I would hold that S. 41, Indian Army Act, is not *ultra vires* of the Indian Legislature in respect of subjects of Indian States for offences alleged to have been committed by them outside British India, and that Burhan-ud-Din is triable by a Court-martial under the Indian Army Act, 1911. In this view of the matter, it cannot be held that Burhan-ud-Din is being illegally or improperly detained in custody by the military authorities. I would, therefore, dismiss this application.

Sale J. — I agree generally with my learned brother Abdul Rashid and in particular, that the application must be dismissed. It seems desirable, however, that I should briefly state my reasons. The petitioner Burhan-ud-Din belongs to the ruling family of the State of Chitral and is a subject of that State. As such he obtained a King's Commission in the Indian Army in 1936. He is under trial by a Court-martial convened in Delhi, under S. 41, Indian Army Act, for what are described as "Civil offences" punishable under Ss. 121 and 302, Penal Code, alleged to have been committed as a member of the "Indian National Army" in Malaya and Burma, that is, outside British India, during its occupation by the Japanese in the recent war. The defence objections which form the basis of this *habeas corpus* petition were three-fold: (1) that S. 41, Indian Army Act, in its application to the

case of Burhan-ud-Din is *ultra vires* of the Indian Legislature; (2) that the charges do not constitute offences, the trial of which is within the competence of a Court-martial; and; (3) that in so far as the charge punishable under S. 121, Penal Code, is concerned, the proceedings of the Court-martial are without jurisdiction in the absence of sanction by the Provincial Government under S. 196, Criminal P. C. During the course of arguments by Sir Tek Chand for the petitioner it was made to appear that the basis of the second objection is dependent to some extent on evidence and is, therefore, outside the scope of this petition under S. 491, Criminal P. C. It is also clear that the question of the applicability of S. 196, Criminal P. C., as indeed of the Criminal Procedure Code in general, to Court-martial proceedings, is not a proper subject for investigation in this application. This Bench is not sitting in appeal or revision from any finding of the Court-martial, but having been constituted to deal with an application under S. 491, Criminal P. C., is concerned solely with the question of the legality of the detention of Burhan-ud-Din, for the purpose of his trial by the Court-martial convened under the Indian Army Act.

The sole point for determination, therefore, is whether the Indian Legislature was competent to enact S. 41, Indian Army Act, in so far as it empowers a Court-martial constituted under that Act to try a subject of an Indian State for offences committed outside British India. Sir Tek Chand made it clear in the course of his arguments that he was not making a general attack on the validity of S. 41, Indian Army Act, which he conceded was valid in respect of the exercise of extra-territorial jurisdiction for certain purposes, e. g., for the purpose of the trial of British Indian subjects for offences committed anywhere, or for the trial of subjects of Indian States for offences committed within British India. He contended, however, that the Indian Legislature had no power to enact a provision for the trial of the subjects of a State for offences committed outside British India, even though the subject concerned may be a commissioned officer in the Indian Army, and that to this extent, S. 41, Indian Army Act, is *ultra vires* of the Indian Legislature.

It was decided by their Lordships of the Privy Council in (1878) 3 A. C. 889¹ that the Indian Legislature is not in any sense an agent or delegate of the Imperial Parliament, but its powers are circumscribed by

the terms of the Acts of Parliament by which these powers are conferred. When, therefore, the provision of any particular Act of the Indian Legislature is called into question, it is the duty of the Courts to consider whether the provision impugned is within the terms of the statute of Imperial Parliament by which the powers were conferred. The Indian Army Act was passed in 1911, and it is common ground that the parent Act of Parliament, which was in force in 1911, was the Indian Councils Act of 1861, also known as the Government of India Act, 1861, the relevant section of which is 22. To appreciate the arguments on this point, it is necessary first to consider the historical background of this 1861 legislation. Sir Tek Chand devoted much of his arguments to this consideration, which no doubt may be a relevant factor in interpreting the true meaning of a statute. Prior to 1813 it seems to have been taken for granted that the East India Company was entitled to make "articles of war" for the governance and control of its non-European Troops, but, in order to remove doubts, power was expressly conferred by S. 96, Charter Act, passed by Parliament in 1813, to enable the company to control

"all officers and soldiers, being natives of the East Indies, and other places, within the limits of the company's charter in the service of the said company and for the administration of justice by Courts-martial."

The limits of the company's charter were those recognised by the Charter of 1698, viz., anywhere between the Cape of Good Hope on the West and the Straits of Magellan on the East. The expression "native" in this connection appears to have been used in contradistinction to the word "European", and without speculating on the precise extent to be assigned to the phrase "natives of the East Indies and other places within the limits of the company's charter" it is sufficient to say that the interpretation must in my view be very wide and would certainly include any Asiatic inhabitant of the continent of India, and of the adjoining countries on the North-West, such as Chitral. This provision of the 1813 Act is in terms repeated in S. 73 of the next Charter Act, granted by Parliament in 1833, which empowered the Governor-General in Council "to make articles of war for the government of the native officers and soldiers in the military service of the Company and for the administration of justice by Courts-martial to be holden on such officers and soldiers"

and it further prescribed that such articles of war shall be

"of exclusive authority over all the native officers and soldiers to the said military service to whatever Presidency such officers and soldiers may belong or wheresoever they may be serving."

Section 2, Indian Councils Act of 1861, repeals certain sections of the 1833 Act, but *not* S. 73, which is expressly saved by Provisos 2 and 4 to S. 22 of the 1861 Act. Section 73 of the 1833 Act was not repealed till the enactment of the Government of India Act of 1915. The learned Advocate-General contended that the Parliamentary sanction for S. 41, Indian Army Act, is to be found in S. 73 of the 1833 Act, which was in force in 1911; and that the wording of S. 73 gives extra-territorial powers in respect of jurisdiction which would cover any non-European recruited to the Indian Army, — whatever his origin — and make him amenable for offences committed "wherever serving," that is in any place beyond the limits of British India. Sir Tek Chand for the petitioner argued that S. 73 of the Act of 1833, although not in terms repealed by the Act of 1861, had in fact become inoperative by the Act of 1861 and that the case for the validity of S. 41 must depend on the provisions in the substantive part, rather than in the provisos of S. 22 of the Act of 1861 which, he contended, as a consolidating Act, must be regarded as a complete statement of the law and should not be interpreted by reference to a previous enactment. In the alternative, it was argued that if S. 22 of the Act of 1861 is to be interpreted as saving S. 73 of the Act of 1833 in its entirety, section 73 only gave power to legislate in respect of non-Europeans who were born in, and the inhabitants of, the then recognised Presidencies of Bengal (including Agra), Bombay and Madras; and consequently a subject of a country like Chitral, which was independent territory till 1876, could not possibly have been within the contemplation of the framers of the 1833 Act as a person to be made amenable to its provisions.

Now it is true that S. 22 of the Act of 1861 as then enacted, was not a comprehensive measure in the matter of extra-territorial jurisdiction. The exercise of jurisdiction was confined to territories in British India; except that in the case of servants of the Government, jurisdiction could be exercised also in the territories within the dominions of Princes and States in alliance with Her Majesty. Parliament by two amending Acts of 1865 and 1869 extended the scope of extra-territorial jurisdiction; and these amendments are incorporated in S. 4, Penal

Code, as it now stands. But even with these amendments there is no power under the Penal Code, to try a subject of any Indian State for an offence committed outside British India. From this fact, Sir Tek Chand argued that the intention could not have been, to give any wider extra-territorial jurisdiction in the case of persons amenable to the Indian Army Act.

But, in my view, the legal position as regards extra-territoriality in respect of offences committed by persons governed by the Penal Code, is no guide to the case of persons amenable to the Indian Army Act. We have here to consider the applicability of a special Act dealing not with civilians, but with military officers and soldiers; and intended to control persons who have enlisted in, or hold commissions in, the Army. Section 4, Penal Code, deals with the persons, not amenable to Indian Military law, which is specially saved by S. 5, Penal Code. The validity of the Indian Army Act must be considered without reference to what may be called the position of civilian offenders. The most important matter to notice in this connection is that in the Charter Act of 1833, there were two sections dealing with jurisdiction over offenders, viz., Ss. 43 and 73. Section 73 was limited to the cases of military personnel; and S. 43 seems to have been intended to cover the cases of all others, the only mention of military officers and soldiers being in the saving clause of S. 43 which barred power to pass laws affecting this class of persons for which S. 73 was intended. Section 43 was expressly repealed by S. 2 of the Act of 1861; but its provisions were re-enacted in the substantive part of S. 22. Section 73 was not in terms re-enacted but was expressly saved; and was continued in force in its entirety by Provisos 2 and 4 to S. 73. It was not until 1915 that S. 73 was repealed, by the Government of India Act of that year.

It follows, therefore, in my view, that the substantive part of S. 22 was only intended to apply to non-military offenders, that the case of military offenders is governed only by S. 73 of Act, 1833, which is saved by the proviso to S. 22 of the 1861 Act, and that arguments regarding jurisdiction over military offenders, based on the analogy of the substantive provisions of S. 22, are unsound. The history of the amendments to S. 22 of the Act 1861 up to the time that it took its present form as enacted in S. 4, Penal Code, is thus immaterial. I would, therefore, accept the contention of the learned Advocate-Gener-

ral that the sanction for S. 41, Indian Army Act, is to be found in S. 73 of the Act of 1833 which was still in force in 1911 when the Indian Army Act was passed. In this view, the whole basis of Sir Tek Chand's argument that proviso 2 to S. 22 is repugnant in any way to the substantive portion of S. 22 disappears. There is no repugnancy in respect of jurisdiction over State subjects amenable to Military law for offences committed outside British India, because, the whole of S. 73 which governs such cases, was saved, and was expressly continued the operation. It did not lapse or become in any way inoperative, as argued by Sir Tek Chand.

As regards the alternative argument of Sir Tek Chand that S. 73 of the 1833 Act must be interpreted in the narrow sense of being confined to the "Natives" of the then known Presidencies, viz., Bengal (including Agra), Madras and Bombay, I can find no warrant for any such restricted interpretation. The plain wording of S. 73 is against any such interpretation. The reference to the Presidencies is clearly to service in the separate armies of the three Presidencies, as then constituted. The plain reading of S. 73 requires in my view a wide interpretation to be placed on its words; and, it would certainly include any Asiatic inhabitant of India — as then known — and of the adjoining countries such as Chitral, whatever their then political status. It is immaterial that Chitral did not, technically become part of "India", as now defined, till 1876. Sir Tek Chand argued, however, that the changing historical background, prior to, and between, 1813 and 1861 would justify a narrower interpretation. He pointed out that the original trading powers of the Company had been gradually restricted till they were virtually suspended in 1833; and he argued that a similar restriction should be assumed to have been intended on the powers of governance and control over Military personnel in the service of the Government. I can see no warrant for this argument. No doubt, the geographical limits of the Company Charter as originally granted were in effect being restricted and confined; and the whole character of the Company's status was being radically altered; but this fact would not affect the Company's control over its army. Indeed the gradual extension of the governmental responsibilities of the Company would, in my view, be wholly incompatible with any such restriction in the control over its army. It is only reasonable that an army should carry its law with it, and that full extra-

territoriality in the matter of jurisdiction for the purpose of control over Military personnel, should be provided by that law so that its soldiers should be made amenable to discipline — wherever called upon to serve. In the case of civilians no such measure of extra-territoriality is required; nor usually provided by statute.

Primarily, the legislation of a country is territorial; and while Parliament has a right to impose its legislation on its subjects in every part of the world, the presumption was generally understood, before 1915 at any rate, to be against such a wide scope, except in regard to such matters as personal status (*see* Maxwell Interpretation of Statutes Chap. VI, S. 1). I say before 1915, because we are here dealing with the law as it stood in 1911; and the observations of the learned Chief Justice of the Federal Court in 6 F. C. R. 229⁸ at p. 258 to which we were referred by the learned Advocate-General imply that no such contrary presumption should be made now. In this case we have the clearly expressed intention in S. 73 of the Act of 1833 to give extra-territorial jurisdiction over all Indian officers then employed in the Indian Army, wherever they may be called on to serve; and this power clearly extends over all such officers and men, whatever their country or origin, whether it be British India, or an Indian State, whether under the suzerainty of Her Majesty or in alliance with Her Majesty.

I agree, therefore, with my learned brother in holding that S. 41, Indian Army Act is in all respects *intra vires* of the Indian Legislature. The petitioner Burhan-ud-Din, a subject of Chitral State, was granted, as a State cadet a King's commission in 1936 and *ipso facto* became amenable to the provisions of the Indian Army Act. He can, therefore, be tried under S. 41, Indian Army Act, by Court-martial constituted under the Indian Army Act for offences committed outside British India. On this finding it becomes unnecessary to consider the learned Advocate-General's additional arguments that S. 41, Indian Army Act, was validated by virtue of S. 180 (2) (b), British Army Act of 1881, as well as by the subsequent enactment of the 1915 Government of India Act under which an amendment, immaterial to the point now in issue, was introduced into the Indian Army Act in 1934. Nor is it necessary to

8. (144) 31 A. I. R. 1944 F. C. 51 : 1944-6 F. C. R. 229 : I. L. R. (1944) Kar. F. C. 105:214 I. C. 244 (F. C.), Governor-General in Council v. Raleigh Investment Co. Ltd.

consider the effect of the Government of India Act, 1935, and the Adaptation of Laws Order, 1937, nor does the question arise whether, as an alternative to action under S. 41, Indian Army Act, Burhan-ud-Din would be amenable as an officer of His Majesty's Indian Army, to the provisions of the British Army Act. I agree that the petition be dismissed.

Munir J. — I agree with my brother Abdul Rashid that this rule should be discharged. Burhan-ud-Din who is a subject of the Chitral State is being tried by a general Court-martial for certain civil offences which he is alleged to have committed outside British India and which by reason of S. 41, Indian Army Act, are offences against military law. The question is whether being the subject of an Indian State he is liable to be tried for such offences by a Court-martial constituted under the Indian Army Act, 1911. It is conceded that the case is covered by S. 41 of the Army Act but it is contended that inasmuch as this section is sought to be applied to a person who is not a British Indian subject in respect of offences committed outside British India it was *ultra vires* the Indian Legislature when it was enacted. The question has been argued more or less in the abstract. The correct approach to such questions was indicated by me in A. I. R. 1944 Lah. 33⁹ where I had the occasion to point out that in determining questions of *ultra vires* the true function of a Court on a particular case coming before it is to decide for the purposes of that particular case whether the law under which a person is sought to be made liable was or was not within the powers conferred upon the Legislature by the Act of Parliament from which it derives its authority to legislate and to give judgment in the case according to the Court's view of the validity of the law. When the present case is approached in the light of this principle the only issue that has to be determined is whether, at the time the liability to prosecution was incurred, Burhan-ud-Din belonged to that class of persons for whom the Indian Legislature was competent to legislate in regard to offences committed outside British India, this being common ground that there is a class of persons for whom the Indian Legislature could not legislate so as to make them liable for offences committed outside British India. Section 41, Indian Army Act, inasmuch as it makes persons

subject to that Act liable for offences committed outside British India was enacted by the Indian Legislature in exercise of the powers that were given to it by S. 73, Charter Act of 1833, 3 and 4 Will. IV, Cap. 85, which is as follows :

"73. And be it enacted, that it shall be lawful for the said Governor-General in Council from time to time to make Articles of War for the government of the native officers and soldiers in the military service of the Company, and for the administration of justice by Courts-martial to be holden on such officers and soldiers, and such Articles of War from time to time to repeal or vary and amend; and such Articles of War shall be made and taken notice of in the same manner as all other laws and regulations to be made by the said Governor-General in Council under this Act, and shall prevail and be in force, and shall be of exclusive authority over all the native officers and soldiers in the said military service, to whatever Presidency such officers and soldiers may belong, or wheresoever they may be serving : Provided nevertheless, that until such Articles of War shall be made by the said Governor-General in Council any Articles of War for or relating to the government of the Company's native forces, which at the time of this Act coming into operation shall be in force and use in any part or parts of the said territories, shall remain in force."

It is clear from the terms of this section that the Governor-General in Council was given by Parliament the power to make articles of war for the government of the native officers and soldiers in the military service of the Company, 'wheresoever they may be serving.' If, therefore, the Governor-General in Council made a law declaring that native officers and soldiers in the military service of the Company would be liable to be dealt with under the Military Code even if the offence were committed by them while they were serving outside British India, the law would be within the limits of the power given and not *ultra vires*. When Legislative Councils were set up in India, by the Indian Councils Act, 1861 (24 and 25 Vict., Cap. 67), S. 73, Charter Act of 1833, was expressly kept alive by that Act. Section 22, Indian Councils Act, gave to the Governor-General in Council power to make laws and regulations for all persons, whether British or native, foreigners or others, and for all Courts of justice whatever, and for all places and things whatever within the territories under the dominion of Her Majesty, and for all servants of the Government of India within the dominions of Princes and States in alliance with Her Majesty. This section contained a proviso of seven exceptions of which the following three are material :

"Provided always, that the said Governor-General in Council shall not have the power of making

9. ('44) 31 A. I. R. 1944, Lah. 33 : I. L. R. (1944) Lah. 245 : 212 I. C. 321 (F. B.), Harkishen Das v. Emperor.

any laws or regulations which shall repeal or in any way affect any of the provisions of this Act :

Or any of the provisions of the Act of the third and fourth years of King William the IV, Chapter 85, which after the passing of this Act shall remain in force :

Or of the Acts for punishing mutiny and desertion in Her Majesty's Army or in Her Majesty's Indian Forces respectively, but subject to the provision contained in the Act of the third and fourth years of King William the IV, Chapter 85, section seventy three respecting the Indian Articles of War."

The repealing section of this Act repealed some sections of the Charter Act of 1833 in their entirety and some others inasmuch as they related to vacancies in the office of ordinary member of the Council of India. One other Act in its entirety and certain sections of another Act were also repealed by that section which after stating the repeal provided :

"all other enactments whatsoever now in force with relation to the Council of the Governor-General of India or to the Councils of the Governors of the respective Presidencies of Fort Saint George and Bombay shall, save so far as the same are altered by or are repugnant to this Act, continue in force and be applicable to the Council of the Governor-General of India and the Council of the respective Presidencies under this Act."

Sir Tek Chand contends that inasmuch as the enacting clause of S. 22, Indian Councils Act, gave power to the Governor-General in Council to legislate only for persons, Courts, places and things within the territories under the dominion of Her Majesty and the power to legislate extra-territorially was given by that clause only in respect of 'servants of the Government of India within the dominions of Princes and States in alliance with Her Majesty,' S. 73, Charter Act of 1833, in so far as it gave extended powers of extra-territorial legislation must be taken to be repugnant with the enacting clause and, therefore, to have been repealed by that clause to the extent of the repugnancy by reason of S. 2, Indian Councils Act. There are several answers to this contention. In the first place, though the word 'enactment' may not always mean an Act, in S. 2, Indian Councils Act of 1861, the words 'all other enactments' cannot possibly refer to S. 73, Charter Act of 1833. As already pointed out, S. 2, Indian Councils Act, expressly repealed certain sections of the Charter Act of 1833 in their entirety and certain others inasmuch as they related to matters for which provision had been made in the Indian Councils Act, 1861, itself. If, therefore, it was intended that S. 73 inasmuch as it gave to the Governor-General in Council the power to legislate extra-territorially for the native

officers and soldiers in the military service of the Company was to be repealed *pro tanto*, this should have been stated in that section just as the repeal *pro tanto* of Ss. 61 and 64, Charter Act of 1833, was stated. As it is, however, not only the whole of the Charter Act of 1833 with the exception of certain sections was kept in force by the Indian Councils Act but S. 73 was expressly saved by proviso 4 to S. 22 of that Act. I am therefore, clear that the effect of S. 2 and Provisos 2 and 4 to S. 22, Indian Councils Act 1861, was to preserve in their entirety the powers of extra-territorial legislation that had been given to the Governor-General in Council by S. 73, Charter Act of 1833. While the scope of the purview cannot be enlarged by reference to the proviso, repugnancy with the purview alone is no ground for giving the go-bye to the proviso or not giving it full effect. Often the proviso is no more than an exception or a qualifying clause and in such a case there is *ex hypothesi* some repugnancy between the purview and the proviso. An argument founded on repugnancy alone is, therefore, ineffective against the clear terms of a proviso. The rule on this point is thus stated in Craies on Statute Law at page 198 :

"It sometimes happens that there is a repugnancy between the enacting clauses and the provisos and saving clauses. The question then arises, How is the Act, taken as a whole, to be construed? The generally accepted rule with regard to the construction of a proviso in an Act which is repugnant to the purview of the Act is that laid down in (1726) Fitzg. 195¹⁰ namely, that where the proviso of an Act of Parliament is directly repugnant to the purview, the proviso shall stand and be a repeal of the purview, as it speaks the last intention of the makers."

I am, therefore, definitely of the view that S. 73, Charter Act of 1833, was not in any way touched or affected by the Indian Councils Act, 1861, and that, on the contrary, it was kept in full force by that Act. When the Government of India was transferred from the Company to Her Majesty in 1858, it was provided by S. 56, Government of India Act, of that year that the military forces of the East India Company shall be deemed to be the Indian military forces of Her Majesty and that such forces and all persons thereafter enlisting in or entering the same, shall continue and be subject to all laws of the Governor-General of India in Council and articles of war, and to all other laws, regulations and provisions relating to the East India Company's military forces, as if

10. (1726) Fitzg. 195 : 94 E. R. 716, Attorney-General v. Chelsea Waterworks.

Her Majesty's Indian military forces had through such Acts, laws, articles, regulations and provisions been mentioned or referred to instead of such forces of the Company. By reason of this provision S. 73, Charter Act of 1833, must be taken to have been automatically adapted and to have given power to the Indian Legislature to legislate extra-territorially for the native officers and soldiers in the military service of Her Majesty. As thus adapted the section continued in force until the Government of India Act, 1915, was passed, and it is common ground that S. 41, Indian Army Act, inasmuch as it legislated for native officers and soldiers of His Majesty extra-territorially, was passed in 1911 in exercise of these powers. That being so, the question that falls to be determined in this case is whether Burhan-ud-Din at the time he incurred the liability to be tried under the Indian Army Act was a native officer in the military service of His Majesty. Sir Tek Chand contends that the word 'native' in S. 73, Charter Act of 1833, does and can only refer to persons who were born or ordinarily resident in the territories that were in the possession and under the Government of the East India Company in 1833, or that came into the possession and under the Government of His Majesty subsequently. In this connection, he relied on the words 'to whatever Presidency such officers and soldiers may belong' that occur in that section but it is clear from the context in which these words are used there that what was intended to be said was that native officers and soldiers were subject to the legislative power of the Governor-General in Council to whichever Presidency's forces such officers and soldiers might belong. It must be remembered that at the time of the enactment of the Charter Act of 1833, there were three Presidencies each of which employed its own forces. The effect of S. 73 of that Act was to constitute the armies of the different Presidencies into one for disciplinary legislation and to make them subject to the legislative power of the Governor-General in Council.

The distinction between the powers of the Governments of the three Presidencies of Fort William, Fort Saint George, and Bombay to legislate in respect of native officers and soldiers and the natives of the several territories subject to the said Presidencies is clearly brought out in S. 96, East India Company Act, 1813, whereby these Governments were given the authority to make laws and regulations and Articles of War

for the order and discipline of all officers and soldiers who were "natives of the East Indies or other places within the limits of the said Company's Charter" in as full and ample a manner as such Governments might make any other laws or regulations for the government of the natives of the several territories subject to the said Presidencies. It is clear from this section that even persons who were not natives of the territories subject to any of the Presidencies, were subject to the legislative authority of those Presidencies if they were natives of the East Indies or other places within the limits of the Company's Charter. Under this provision a person who was not a subject or resident of any of the three Presidencies was subject to the legislative authority of the Government of the Presidency in which he was serving provided he was a native of the East Indies or any other place within the limits of the Company's Charter, which extended to all places to the east of the Cape of Good Hope up to the Straits of Magellan.

It is a matter of common knowledge that recruitment to the military forces of the Company or of His Majesty's Indian forces never was or has been confined to persons born or residing within the territories subject to the Government of the East India Company or of His Majesty and that persons born or residing in territories not occupied or governed by the British were also eligible for service in such forces. Our attention has not been drawn to any law prohibiting the enlistment of such persons; nor has it been suggested that such persons who enlisted in the Company's forces or His Majesty's Indian forces were governed by a military law different from the one by which persons born or residing in the territories in the possession or under the Government of the Company or His Majesty were governed. I have, therefore, no doubt in my mind that the word 'native' was used at the time S. 73 of the Act of 1833, was enacted and even later merely in contradistinction to Europeans who were governed by the British Military Code and the power to legislate about whom was always kept by Parliament in its own hands. This seems to me to be perfectly clear from the later statutes, namely, 3 and 4 Vict., Cap. 37, 7 and 8 Vict., Cap. 18, and 12 and 13 Vict., Cap. 43, each of which draws a distinction between the forces of His Majesty or the Company's forces on the one hand which were subject to the English Mutiny Acts, and the officers or soldiers who were natives of the East Indies or other

places within the limits of the Company's Charter on the other who were subject to the Indian Military Law. In this respect s. 7 of 3 and 4 Vict., Cap. 37 is particularly important because it specifically preserved the Articles of War made or to be made in future by the Government of India respecting officers or soldiers being natives of the East Indies or other places within the limits of the said Company's Charter. The first section of 7 and 8 Vict., Cap. 18 drew a distinction between officers or soldiers in the service of Her Majesty, officers and soldiers in the service of the East India Company who were not natives of the East Indies or other places within the limits of the Company's Charter and the officers and soldiers in the service of the Company who were the natives of the East Indies or other places within the limits aforesaid.

It seems to me to be quite clear from this classification of the forces that whereas officers and soldiers in the service of His Majesty and officers and soldiers in the service of the East India Company who were not natives of the East Indies or other places within the limits of the Company's Charter were not subject to the legislative control of the Government of India, officers and soldiers who were natives of the East Indies or other places within the limits of the Company's Charter were subject to such control. This illustrates the position, which still exists, that whereas European officers and soldiers in His Majesty's inland forces have always been subject to English Military Law, officers and soldiers enlisted in His Majesty's Indian forces have always been subject to the Army Acts enacted by the Indian Legislature. Therefore, the word 'native' used in s. 73 of the Act of 1833, appears to me to have been intended to apply and was in fact subsequently applied to natives of this country who were not subject to English Military Law. Even according to the dictionary meaning, which is a survival from the times of which I have been speaking, one of the meanings of the word 'native' is a non-European and this seems to me to be the meaning of the word wherever used in the Army Acts up to the present time. The word is wide enough to include persons born in or subjects of Indian States under the suzerainty of His Majesty.

By s. 311, Government of India Act, 1935, India is defined as British India together with all territories of any Indian Ruler under the suzerainty of His Majesty, and all territories under the suzerainty of such an Indian Ruler. According to the certificate of the

Secretary to His Excellency the Crown Representative Chitral is an Indian State under the suzerainty of His Highness the Maharaja of Jammu and Kashmir who himself is under the suzerainty of His Majesty. Burhan-ud-Din is, therefore, a native of "India" or an Indian subject. The State of which he is a subject is not a sovereign State having independent existence in International Law and its subjects have no international status other than that of an Indian. It is true that the word *India* has received this definition comparatively recently and that the doctrine of suzerainty or paramountcy came into existence long after the Charter Act of 1833, was enacted. But as I have already pointed out, it is Burhan-ud-Din's status at the time the offence was committed that has to be considered in determining whether he is liable to be tried under the Indian Army Act and judged by this test there can be no doubt that he belongs to that class of persons who were described as native officers and soldiers in s. 73, Charter Act of 1833. The expression "native officers and soldiers" in that section appears to me to have been used in its ordinary racial meaning and in contradistinction to European officers and soldiers who were subject to English Military Law and not in the strict territorial sense contended for by the learned Advocate-General of India, namely, natives of East Indies and other places within the limits of the Company's Charter. If it had been intended to use it in that sense there is no reason why the expression "natives of East Indies and other places within the limits of the Company's Charter" which occurs not only in earlier but also in later statutes should not have been used in the Charter Act of 1833. For these reasons, I agree with my brother Abdul Rashid that this rule be discharged.

By the Court. — We certify, under the provisions of s. 205, Government of India Act, that this case involves a substantial question of law as to the interpretation of the Government of India Act, 1935, and the Government of India (Adaptation of Indian Laws) Order, 1937.

D.R./D.H.

Application dismissed.

[Case No. 34.]

A. I. R. (33) 1946 Lahore 177**HARRIES C. J. AND MAHAJAN J.***Madhori Saran and others —**Appellants*

v.

The Collector and others—Respondents.

Letters Patent Appeal No. 60 of 1944, Decided on 28th September 1944, from judgment of Monroe J., in Exn. First Appeal No. 334 of 1942, D/- 23rd November 1943.

U. P. Encumbered Estates Act (25 [XXV] of 1934), S. 14 (7)—Decree passed under S. 14 (7) can be executed outside United Provinces.

The principle underlying the provisions of transfer of decrees and their execution by that process is that there should be a valid decree of a competent civil Court against the person of the judgment-debtor within certain territorial limits. Once that decree is a good decree, it can be taken anywhere by the process of transfer and can be executed against his person and property wherever it may be situated. [P 180 C 1]

A decree of a Special Judge under the provisions of S. 14, sub-s. (7) is a decree of a competent civil Court in the United Provinces. It is on the same footing and has the same status as a decree of a Civil Judge acting under its ordinary civil jurisdiction. Its validity cannot be questioned by Courts in another Province. Hence a decree passed under S. 14 (7) can be executed outside the United Provinces by transfer or otherwise against property situate in another Province: ('44) 31 A. I. R. 1944 Lah. 302, *Expl.*; 11 Mad. 26 (P. C.); ('39) 26 A. I. R. 1939 Cal. 145; ('30) 17 A. I. R. 1930 Cal. 53 and 22 Mad. 256, *Disting.* [P 178 C 1; P 179 C 1,2]

Barkat Ali and C. L. Aggarwal —

for Appellants.

Advocate-General, U. P. Allahabad, Melaram and Tek Chand and Chhail Bihari Lal, Government Pleader, Saharanpur —

for Respondents.

Mahajan J. — The facts giving rise to this Letters Patent appeal are few and simple. Raja Joti Parshad of Jagadhri executed a pronote in favour of the Peoples Bank of Northern India Limited in the year 1929 for a sum of Rs. 52,000 odd. The Bank sued the Raja on the pronote and obtained a decree from a Court in Lahore in the year 1930. Raja Joti Parshad died and on 23rd September 1930, Court of Wards (Punjab) took charge of his estate. Subsequently, the Court of Wards through the Deputy Commissioner, Ambala, invoked the jurisdiction of the Special Judge, Saharanpur, under the U. P. Encumbered Estates Act, 25 [XXV] of 1934 and presented a petition under the provisions of that Act. In April 1937, the Special Judge passed a money decree for a sum of Rs. 80,000 odd under the provisions of S. 14 of that Act. The Collector then approached the Special Judge for transfer of the execution proceedings to the District Judge, Ambala, so that the property

of the judgment-debtor situate in that district be proceeded against to satisfy the decree. On 16th December 1941, 450 shares belonging to the judgment-debtor's estate in the Jagadhri Light Railway Company Limited were attached in execution of the decree and were sold in favour of the respondents. This sale led to the presentation of two petitions on behalf of the legal representatives of Raja Joti Parshad, the present appellants. The first petition was presented on 5th January 1942 and was labelled under Ss. 47 and 151, Civil P. C. It stated that the price fetched at the auction sale was inadequate and the sale was irregular and should be set aside. It may be mentioned that no objection was taken to the jurisdiction of the executing Court at that stage. A month later on 6th February 1942, another objection petition was made by the present appellants in which they objected to the jurisdiction of the executing Court to sell the property in execution of the decree of the Special Judge, but they added a proviso that this could not be done till the property in the United Provinces had been exhausted. The objection in other words related to the prematurity of the execution application and did not relate to the want of inherent jurisdiction in the executing Court.

The executing Court dismissed the objection and held that it was not competent because under the provisions of O. 21, R. 78, Civil P. C., no objection regarding the sale of movable property could be lodged during execution proceedings but the remedy was to proceed by a regular suit. Against this order of the executing Court, an appeal was preferred to this Court which was heard by a learned Single Judge who upheld the decision of the executing Court. Hence this Letters Patent appeal. The principal point argued by Malik Barkat Ali for the appellants before us is that the decree passed by the Special Judge, Saharanpur, exercising jurisdiction under the United Provinces Encumbered Estates Act, which is a statute of a Local Government, cannot be executed beyond the territorial limits of that Government. The learned counsel contended that even though it might be a valid decree in the United Provinces, it could only be executed within those Provinces and execution of that decree could not be taken by transfer or otherwise against property situate in another Province. As I have already mentioned, this objection in these terms was not raised in the executing Court. However, the matter went to the root of the whole case

and, therefore, we heard the learned counsel on this point at some length.

The way that I look at the matter is a very simple one. It cannot be disputed that the decree of the Special Judge, Saharanpur, under the provisions of S. 14, sub cl. (7), United Provinces Encumbered Estates Act, is a decree of a competent civil Court in those Provinces. It is on the same footing and has the same status as a decree of a Civil Judge acting under its ordinary civil jurisdiction. It has been given that status by the express provisions of S. 14. That being so, there appears to be no warrant in law to hold that a decree of a competent civil Court in the United Provinces cannot be transferred for purposes of execution to another Province under the provisions of Civil Procedure Code. Once it is a valid decree in those Provinces, its validity cannot be questioned by the Courts in another Province and once it is transferred for purposes of execution, the Courts in the other Province are bound to execute it in accordance with the procedure laid down in the Code of Civil Procedure. This decree cannot be put on any lower footing than the decree of an ordinary civil Court exercising jurisdiction within the United Provinces, and that being so, the argument of Mr. Barkat Ali cannot be sustained on the basis of any statutory provision.

Mr. Barkat Ali to support his contention placed reliance on a Division Bench case of this Court, I.L.R. (1944) Lah. 79,¹ and he drew our attention to various portions of this judgment where observations had been made to the effect that the jurisdiction of a Court created by the Legislature of a Province is limited to the territory of that Province and its decrees cannot, when they come into conflict with the decrees of Courts situated in another Province, have effect. The facts of that case were that Darbar Patiala had obtained a decree from a civil Court in this Province and, it was anxious to keep that decree alive and to execute it. The debtor in that case had invoked the jurisdiction of the Special Judge, Saharanpur, under the United Provinces Encumbered Estates Act. When Darbar Patiala was called upon to submit its claim, it did so on a condition and the condition was that for purposes of property situate in the United Provinces it was willing to appear

before the Special Judge, Saharanpur, but so far as the Punjab decree was concerned, it was not going to submit that decree to the jurisdiction of the Special Judge. In these circumstances, a Bench of this Court ruled that the decree passed by a civil Court in this Province could not be affected by the decree of the Special Judge exercising jurisdiction under the provisions of the United Provinces Encumbered Estates Act, particularly when the submission to the jurisdiction of that Judge was a conditional one. That case, in my view, does not in any way affect that decision of the present case. It appears to me, however, that certain observations made in that judgment definitely furnish a reply to the contention of the learned counsel for the appellants. At p. 98 of the report while discussing the question that is before us Rahman J. observed as follows :

"How far he is entitled to proceed outside the United Provinces and how far is the decree passed by the Special Judge executable against the property situate outside the United Provinces would in my opinion depend on the fact whether the claimant or the decree-holder has willingly and unconditionally agreed to waive his rights or the decree passed in his favour in favour of the Collector and to abide by his decision in the matter of realization of the property and of its distribution amongst the various claimants subject to such alteration as may be effected by any appellate or revisional authority under the Act. In other words, it is the consent of the claimant or the decree-holder that may make the decree effective outside the United Provinces as in case of an award given on a reference made by consent of parties but the so-called decree passed by the Special Judge has in my opinion no binding force without such consent."

In the present case there can be no question that both the judgment-debtors and the decree-holder gave their unconditional consent to the decree that was passed by the Special Judge, Saharanpur. The judgment-debtors themselves invited that Court to exercise its jurisdiction and they cannot be heard to say that any decree passed by that Judge does not bind them. Mr. Barkat Ali seemed to think that the decree had been passed against certain properties situate in this Province but that is not so. The decree is a personal decree against the debtor and, therefore, is executable wherever his properties may be. So far as the decree-holder is concerned, it is the decree-holder himself who has supplied funds to the Collector to execute the Special Judge's decree in the Courts at Ambala. It is at his instance that these proceedings have been initiated by the Collector. That being so, the decree-holder has certainly surrendered all rights that he

1. (44) 31 A.I.R. 1944 Lah. 302 : I. L. R. (1944) Lah. 79, Darbar Patiala v. Narain Das-Gulab Singh.

ever possessed under the Punjab decree obtained in 1929 and has accepted the decree passed by the Special Judge as the final adjudication of his rights and the only decree which he seeks to execute is the decree of the Special Judge at Saharanpur. As observed by Rahman J., therefore, there can be no question in this case that both parties submitted to the jurisdiction of the Special Judge, Saharanpur, unconditionally and the decree passed by him is binding on both of them and is executable both in the United Provinces and in this Province by transfer. Therefore, the case cited by Mr. Barkat Ali instead of helping him in my opinion, is opposed to his contention.

Mr. Barkat Ali placed reliance on a Privy Council case in 11 Mad. 26² at page 35, for the proposition that a plaint or a suit is a condition precedent for the passing of a decree. No exception can be taken to those observations of their Lordships of the Privy Council but they are wholly inapplicable to the facts of the present case. There are certain decisions which come within the definition of the word 'decree' given in the Code of Civil Procedure. There are certain other orders and decisions that have been given the status of a decree by the express provisions of a statute. Orders under ss. 47 and 144, Civil P. C., would not be decrees but for the provision made in s. 2 that they shall be decrees and included within the definition. Similarly, orders passed under the Land Acquisition Act, under the Co-operative Societies Act, under the Indian Companies Act and various other statutes would not be decrees in the ordinary sense of the term but it is open to the Legislature to give them that status and that has been done in a very large number of cases. Similarly, section 14, U. P. Encumbered Estates Act, gives to the decisions of the Special Judge the status of a decree of a competent civil Court in the United Provinces. Therefore, the contention of Mr. Barkat Ali that unless a decree in a case fell within the definition of that phrase in s. 2, Civil P. C., it was not executable by transfer in other Provinces cannot hold water and I have no hesitation in repelling it. This Privy Council case, as I have said, therefore, is wholly inapplicable to the facts and circumstances of the present case. Mr. Barkat Ali then placed reliance on a Single Bench decision of the Calcutta High Court

in A. I. R. 1939 Cal. 145.³ That case only laid down that, after an application had been presented under the U. P. Encumbered Estates Act to the Collector or to the Special Judge, there will be automatic stay of execution proceedings and other proceedings, but that the provision relating to stay would be only binding on the Courts situate within the United Provinces. This decision, in my view, does not in any way help the decision of the present case.

Another case cited by the learned counsel was a decision of a Single Judge sitting on the original side of the Calcutta High Court reported in 56 Cal. 704.⁴ It lays down that s. 4, Civil P. C., gives a local Act local validity and special procedure validity in its own sphere and that no local Legislature can prescribe procedure for any Court beyond its territorial jurisdiction. I have not been able to see the relevancy of this citation. The procedure for execution of decrees by transfer is a well-known procedure and is prescribed by the general law of this country and once a valid decree is passed by a civil Court of competent jurisdiction acting within its own territorial limits, that decree by the process of transfer can be executed against the judgment-debtor outside that Province and his property there can be seized and can be sold in execution of the decree. Mr. Barkat Ali lastly cited a Bench decision of the Madras High Court in 22 Mad. 256.⁵ That decision is on the same point as the Privy Council case that he cited earlier during his arguments and, as I have already pointed out, has no bearing on the present case. It will thus be seen that none of the cases relied upon by the learned counsel support the contention which he sought to establish. I put to the learned counsel a very simple case and that was this: whether a decree passed by the Calcutta High Court exercising jurisdiction on the original side conferred upon that Court by the provisions of its Letters Patent is executable in this Province? That is, a decree passed under a law which confers special jurisdiction upon the Court of one Province. Mr. Barkat Ali said that he had not studied the point and could not answer it. I again put to him a question whether decrees passed by Courts constitu-

2. ('88) 11 Mad. 26: 14 I. A. 160: 5 Sar. 54 (P.C.), *Minakshi Naidu v. Subramanya Sastri*.

3. ('39) 26 A. I. R. 1939 Cal. 145 : I. L. R. (1938) 2 Cal. 541 : 179 I. C. 720, *A. Milton & Co. Ltd. v. Ojha Automobile Engineering Company*.

4. ('30) 17 A. I. R. 193 Cal. 53 : 56 Cal. 704:121 I. C. 403, *Chhattoo Lal Misser & Co. v. Naraindas Baijnath Prasad*.

5. ('99) 22 Mad. 256, *Venkata Chandrappa Nayanivaru v. Venkatarama Reddi*.

ted under the Punjab Courts Act, which is a local statute, could be executed outside? The learned counsel here had to concede that they were valid decrees of a competent civil Court and, therefore, by the operation of the provisions of transfer given in the Code of Civil Procedure they could be executed outside this Province. In these circumstances I do not understand the hesitation of the learned counsel in replying to my first question and it seems to me that, if the contention contended for by the learned counsel was correct, it will practically make the whole procedure of execution of decrees by transfer laid down in the Civil Procedure Code ineffective and nugatory. The general law as laid down in the Code of Civil Procedure has been amended by various local statutes by which decrees which are normally passed by Courts are modified under the provisions of the local statutes, but they still remain decrees executable by transfer in other Provinces against the person and property of the judgment-debtor. The principle underlying the provisions of transfer of decrees and their execution by that process is that there should be a valid decree of a competent civil Court against the person of the judgment-debtor within certain territorial limits. Once that decree is a good decree, then it can be taken anywhere by the process of transfer and can be executed against his person and property wherever it may be situated. Mr. Barkat Ali criticised the judgment of the learned single Judge and argued that he had failed to appreciate the points argued. It is, however, unnecessary to go into those points which were considered by the learned single Judge as it was conceded that the main point and the only point on which the appeal could succeed was the one concerning jurisdiction of the Ambala Senior Subordinate Judge to execute this decree. For the reasons given above, I see no force in this appeal which I would dismiss with costs throughout.

Harries C. J. — I agree.

N.S./D.H. *Appeal dismissed.*

[Case No. 35.]

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FULL BENCH

ABDUL RASHID, DIN MOHAMMAD

MAHAJAN, TEJA SINGH AND MOHAMMAD SHARIF JJ.

Ali Mohammad — Appellant

v.

Mt. Mughlani and others — Respondents.

Second Appeal No. 103 of 1943, Decided on 10th December 1945, referred by Beckett, Mahajan and Teja Singh JJ., D/- 16th April 1945.

(a) Custom (Punjab) — Widow — Alienation by, with consent of next reversioner—Validity—Gift by widow of part of estate comprising ancestral and non-ancestral properties with consent of next reversioner — Next reversioner dying during lifetime of widow—Gift is invalid: L. P. A. No. 9 of 1941; ('41) 28 A. I. R. 1941 Lah. 43=194 I. C. 310; ('36) 23 A.I.R. 1936 Lah. 192=163 I. C. 85 and 5 Lah. 212=('23) 10 A.I.R. 1923 Lah. 353=76 I.C. 592, OVERRULED.

A widow succeeded to the estate of her son comprising ancestral and non-ancestral properties and made a gift of part of the estate comprising ancestral and also non-ancestral properties in favour of her daughters who were not in the line of heirs. The gift was assented to by the next presumptive reversioner who died in the lifetime of the donor. The question was whether the gift was valid or could be challenged by the other reversioners :

Held (per Full Bench) that the gift was invalid and could be challenged by the other reversioners: L. P. A. No. 9 of 1941; ('41) 28 A. I. R. 1941 Lah. 43=194 I.C. 310; ('36) 23 A.I.R. 1936 Lah. 192=163 I. C. 85 and 5 Lah. 212=('23) 10 A.I.R. 1923 Lah. 353=76 I. C. 592, OVERRULED; Observation of Addison, J. in ('34) 21 A.I.R. 1934 Lah. 860 held *obiter*; *Case law discussed.* [P 191 C 2]

Per Mahajan, Abdul Rashid, Teja Singh and Mohammad Sharif JJ. — The estate of a widow under custom in the Punjab and her powers of alienation or surrender are analogous to those of the widow under the Hindu law. The rule in Para. 68 of Rattigan's Digest of the Customary Law of the Punjab to the effect that merely the assent of the next reversioner and one of the several reversioners of equal degree, to an alienation by a widow of her deceased husband's property will not estop the other reversioners from suing to set aside the alienation is valid but is subject to the following limitations:— [P 193 C 2]

(1) Where an alienation by a widow of the estate to which she has succeeded either upon the death of her husband or son, or collaterally, amounts to a surrender of her interest in the whole estate in favour of the nearest reversioner or reversioners at the time of the alienation, the alienation is a valid one. The question of necessity does not fall to be considered in such situation provided that the surrender is *bona fide* and not a mere device to divide the estate with the reversioners. In a case where the next reversioner consents to a gift by her of the whole of her estate in favour of a stranger, this gift may be deemed as a surrender by her, to the nearest reversioner and a conveyance by the latter in favour of the stranger, *qua* non-ancestral property surrendered, and the remote reversioner cannot successfully challenge the gift concerning such property. If the gift includes ancestral property, it is liable to be set aside in respect of such property at the instance of the remote reversioner.

(2) A gratuitous alienation by a widow of a part of her deceased husband's ancestral or self-acquired property, with the consent of the next presumptive reversioner, is invalid. Such an alienation will, however, bind the consenting reversioner and those who derive title through or from him. In a suit for declaration by a remoter reversioner for contesting such an alienation, the declaratory decree should clearly provide that it shall not enure for the benefit of the consenting reversioner or persons deriving title from or through him.

(3) A gratuitous alienation by a widow of her deceased husband's self-acquired property, made

with the consent of the next presumptive reversioner, though invalid at the time when made, will subsequently become indefeasible if the consenting reversioner survives the widow and the inheritance becomes vested in him. If a declaratory decree has already been granted in respect of such an alienation that decree will become infructuous and inoperative.

(4) When an alienation for consideration by a widow of the whole or part of her husband's estate, whether ancestral or self-acquired, to which she has succeeded is to be supported on the ground of necessity, the consent of the nearest reversioner or reversioners at the time of the alienation, as might fairly be expected to be interested to question the transaction will be held to afford a presumptive proof which, if not rebutted by a proof to the contrary, will validate the transaction as a right and proper one: ('18) 5 A.I.R. 1918 P. C. 196, *Rel. on; Case law discussed.* [P 193 C 1, 2]

(b) Custom (Punjab) — Succession — One reversioner does not inherit from other (Per *Mahajan, Abdul Rashid, Teja Singh and Mohammad Sharif JJ.*).

An eventual reversioner does not claim through any other reversioner who went before him: ('18) 5 A. I. R. 1918 P. C. 196, *Rel. on.* [P 184 C 1]

(c) Custom (Punjab)—Widow — Estate held by—Nature of—Estate of widow under custom compared with that of widow under Hindu law (Per *Mahajan, Abdul Rashid, Teja Singh and Mohammad Sharif JJ.*).

The estate of a widow under the customary law of the Punjab is analogous to that of the widow under the Hindu law. Under both laws she holds for life for the purpose of maintenance with certain powers of disposition which are necessarily incident to her position. She is, at least under the customary law, in no sense a co-sharer, and the succession, on her death, is not to her but to her husband. In fact, her estate is one interposed only for a limited purpose between that of her husband and the next heir. A widow under Hindu law does not possess the power of making gratuitous transfer of the property inherited by her from her deceased husband except when she is allowed within certain limits to alienate for religious or charitable purpose. Punjab custom confers no power of gift on a widow with respect to her husband's estate. It only permits alienations for necessity provided the requirements of the widow cannot be met out of the income from the estate in her possession. A widow under the Hindu law enjoys a larger power in the matter of enjoyment of the estate than a widow under the Punjab custom. Under that law she is not accountable in respect of the accumulations of the income in her hands while that is not so under Punjab custom: *Case law discussed.* [P 184 C 2; P 185 C 1; P 186 C 1]

(d) Practice — Precedent—Doctrine of stare decisis — Applicability (Per *Mahajan, Abdul Rashid, Teja Singh and Mohammad Sharif JJ.*).

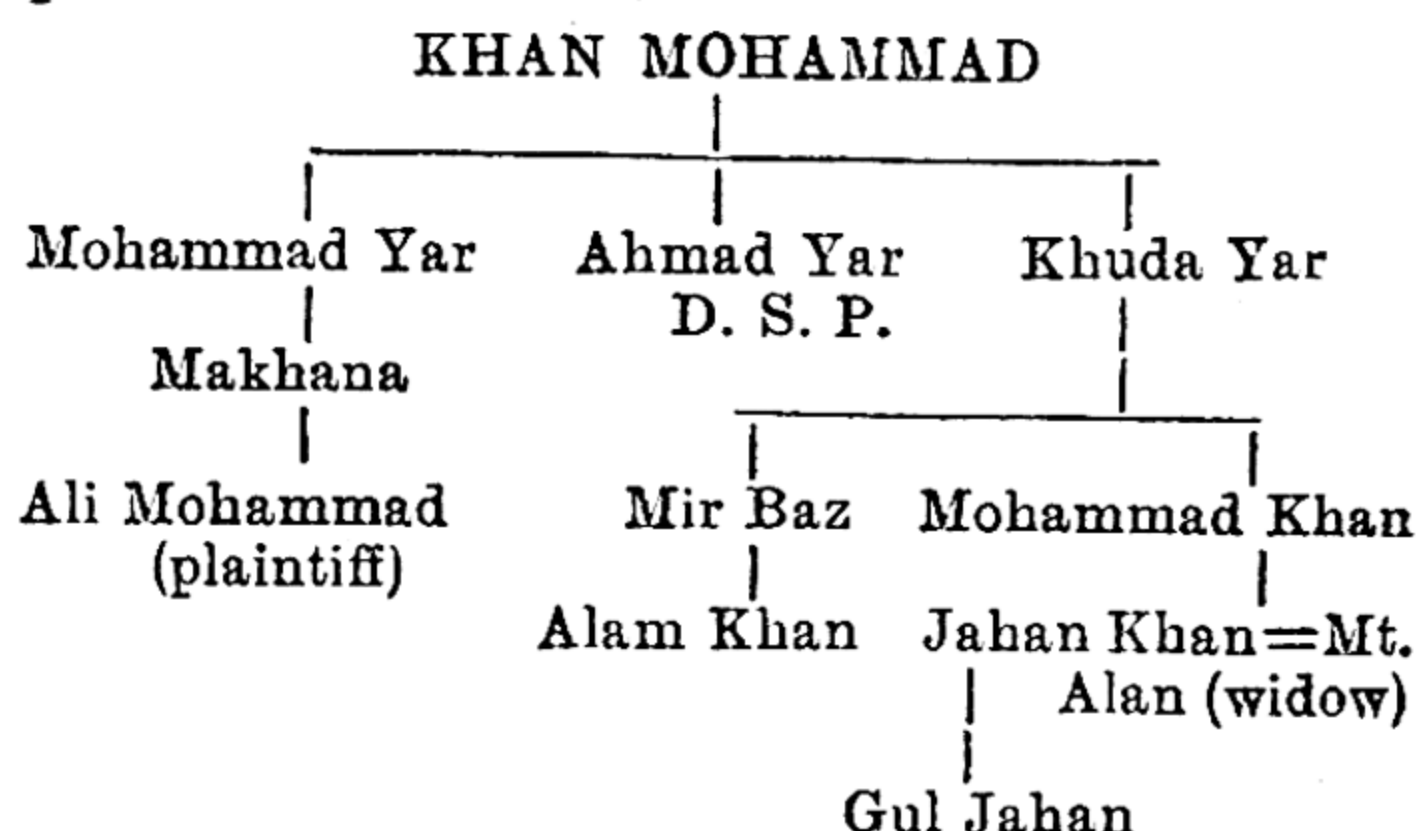
The doctrine of *stare decisis* cannot be invoked when a rule of law, which has prevailed in the Courts of a Province, has subsequently been overruled by their Lordships of the Privy Council. [P 192 C 2]

Kundan Lal Gosain — for Appellant.

Des Raj Sawhney and Bhagat Ram Kohli — for Respondents.

Mahajan J. — "Whether by the mere consent of the immediate reversioner or

reversioners (if more than one) an alienation of a widow governed by custom, of the whole or a part of her husband's estate ancestral or non-ancestral is valid" is the question to decide which this special Full Bench has been constituted. It has to be admitted that the question is of considerable importance and its decision is by no means free from difficulty. There has been considerable divergence of judicial opinion on this point under Hindu law wherein the widow's estate is analogous to the estate of a widow under custom, and the literature dealing with the issue is quite voluminous. It is essential, therefore, that the rule of law on this point be laid down in clear and concise terms for the guidance of the Courts. To appreciate the point involved, it is necessary to set out the pedigree of the litigating parties in the case :



Gul Jahan was the last owner of the property in suit. He left no male or female descendant and, therefore, his mother Mt. Alan inherited the estate he held. On 13th January 1938, she made a gift of 56 *kanals* 15 *marlas* of land i.e., of a part of her son's estate in favour of her daughters (sisters of Gul Jahan) defendants 2 to 5. During the course of the mutation proceedings interrogatories were issued to Alam Khan, the next presumptive reversioner of Gul Jahan. This gentleman was 70 years of age and was himself childless. On 18th September 1938, Alam Khan gave his consent to the gift and the mutation was accordingly sanctioned in favour of the donees on 16th March 1939. Ali Mohammad plaintiff, who is a fifth degree collateral of Gul Jahan, thereupon instituted the present suit to challenge the gift. It is common ground between the parties that they follow custom. It was pleaded on behalf of the donees that the plaintiff was not a collateral of the donor's son and that the property was not ancestral *qua* him. It was further contended that the gift having been made with the consent of Alam Khan, the next presumptive reversioner, was a valid one and could not be challenged by the

plaintiff. A plea was also taken to the effect that the donees were the daughters of the previous owner of the property and the gift amounted to an acceleration of succession and was, therefore, a good one.

The trial Judge held that the plaintiff was a fifth degree collateral of Gul Jahan; that a part of the land gifted was ancestral *qua* him while a part of it was non-ancestral; and that the donees being the sisters of the last male owner were not in the line of heirs to his estate. On the material issue in the case, whether the consent of Alam Khan validated the alienation, the Judge found in the negative. The result was that the plaintiff's suit was decreed in its entirety. Mughlani defendant alone appealed to the Court of the District Judge. The learned District Judge maintained the decision of the trial Judge on all the points except one. Contrary to the decision of the trial Court he held that out of the land in suit an area of 22 *kanals* alone was ancestral and the rest of the property was non-ancestral, and that the consent of Alam Khan was sufficient to validate the gift of that part. The result of this decision was that the plaintiff's suit was decreed in respect of 22 *kanals* out of the land in suit but the rest of his suit was dismissed. The plaintiff preferred an appeal to this Court while the defendants cross-objected. The matter came up before me in the first instance and as the point was of considerable importance, I referred the matter to a Bench for decision. The Division Bench then made a reference to a Full Bench, but, in view of certain recent decisions of this Court the Full Bench considered that the matter should be considered by a larger Bench. Paragraph 68 of Rattigan's Digest of Customary Law deals with this matter in these terms:

"The mere assent of the next reversioner and of one of several reversioners of equal degree to an alienation by a widow of her late husband's property will not debar other reversioners from suing to set aside the alienation."

The article as it now stands in the book was put into its present shape by Sir Henry Rattigan in Edn. 7. The draft of this paragraph by Sir William Rattigan ran thus:

"The mere assent of the next reversioner or of one of several reversioners of equal degree to a sale by a widow of her late husband's property will not estop the other reversioners from suing to set aside the sale as a whole. But a widow may accelerate the succession of the proper reversionary heir by conveying absolutely to him and destroying her own life estate."

If the rule laid down in para. 68 of Rattigan's Digest is followed then it is obvious

that the decision of the learned District Judge cannot be maintained, and the decision of the trial Judge will have to be restored. It has, however, been argued at the Bar that there has been a course of decision in this Court to the effect that the rule enunciated in para. 68 of Digest must be taken to apply to those cases only in which the property alienated by the widow in possession of her husband's estate was ancestral *qua* him and the person who sues to challenge the alienation and it has no application to cases of non-ancestral property. The point for determination is whether this contention is correct, and if so whether the decisions on the point are sound in law. It may be observed that up to the year 1914 no discordant note, so far as I have been able to discover, was sounded in this Court about the correctness of the statement contained in the Digest. On the other hand, a Bench of the Punjab Chief Court in 150 P. W. R. 1914¹ affirmed the rule contained in that article. Ten years later, in the year 1924, a Division Bench of this Court, in 5 Lah. 212,² ruled that the consent of the next presumptive reversioner to a gift made by a widow of the self-acquired property of her deceased husband validated it and that the next reversioner had *no locus standi* to contest it. It was further held that the statement in the Digest that the mere assent of the next reversioner to an alienation by a widow will not debar other reversioners from suing to set aside the alienation applied only to alienations of ancestral property. In that case Mt. Jindan, widow of one Narain Singh, gifted the property to the daughter and the grand-daughters of her husband's brother with the consent of Buta Singh her next presumptive reversioner. This gift was challenged by Buta Singh himself, by his son Wasawa Singh and by two remoter reversioners Sant Singh and Kala Singh. The gift was of a portion out of the total inheritance of Narain Singh in the hands of Mt. Jindan. The trial Judge dismissed the claim of Kala Singh and Sant Singh on the ground that their right to succeed would only come into existence after the death of Buta Singh and Wasawa Singh without male issue. He was, however, of opinion that the consent given by Buta Singh had been given without any intelligent grasp of

1. ('14) 1 A.I.R. 1914 Lah. 365 : 91 P. R. 1914 : 24 I. C. 417 : 150 P.W.R. 1914, *Devi Das v. Raja Khan*.

2. ('23) 10 A.I.R. 1923 Lah. 353 : 5 Lah. 212 : 76 I. O. 592, *Mt. Jaswant Kaur v. Wasawa Singh*.

the situation and of the facts involved and that he did not realise that absolute gifts were being made. The donees appealed to this Court. A Division Bench of this Court held that Buta Singh did consent to the gifts and the consent was given intelligibly. The learned Judges then proceeded to discuss the question of Buta Singh's consent as affecting him and his son. The relevant observations on this point occur at p. 217 and are these:

"The reason why a son can sometimes dispute an alienation assented to by his father of ancestral land is that he has an independent right, not derived from his father, but from the common ancestor to such land; but in the case of non-ancestral land to which his father is heir he has no such right. It is urged that the only right to such land is through his father, and not independent of him. His father's alienation of self-acquired or non ancestral land cannot be controlled by him, and if a person in possession of such land alienates it with his father's consent he cannot object. We have not been referred to any authority, nor do we know of any that under such circumstances a son can object to an alienation to which his father had assented. In the present case, if the widow had not alienated the property and upon her death or remarriage Buta Singh had succeeded and alienated it, the son could not have contested such an alienation whether it was made for necessity or not. Similarly Buta Singh having consented to the alienations made by the widow of Narain Singh, Wasawa Singh, his son, has no right to object. In Art. 68 of Rattigan's Digest of Customary Law, it is stated that the mere assent of the next reversioner to an alienation by a widow of her late husband's property will not debar other reversioners from suing to set aside the alienation. The authorities quoted in support of this appear all to refer to cases of alienations of ancestral land. We do not think the learned author meant it to apply to alienations of non ancestral property and, as already stated by us, we know of no authority which supports such a view. We, therefore, hold that Buta Singh having consented to the alienation in question whether his consent can be said to have been *bona fide* or not, Wasawa Singh has no *locus standi* to maintain the suits."

The decision in this case was based on the limited ground that consent of Buta Singh bound him as well as his son, and they could not, therefore, contest the gift. The case of the other plaintiffs whose suit had been dismissed by the trial Judge was not discussed as they had not appealed and the matter was not argued before the Bench. But the effect of the decision is that it validates a gratuitous alienation by a widow of her husband's self-acquired property in favour of a stranger with the consent of the next presumptive reversioner. 13 Lah. 180³ is the next case which falls for consideration. There a gift of the entire

land by the mother of the last owner to a stranger was ratified by the nearest reversioner after receipt of Rs. 200 from the donee. The gift was held valid by reason of the ratification as it comprised non-ancestral land of the last male owner. It was remarked that Para. 68 of the Rattigan's Digest of Customary Law, was expressed in terms which were much too wide and that its accuracy would have to be tested in the light of the recent decisions of their Lordships of the Privy Council bearing on the question of the validity of alienations made by a Hindu widow, to which the next heir has given his assent or which he has ratified subsequently. It has not been an easy matter to discover these cases. It seems, however, that in these observations reference was made to 30 ALL. 1⁴ and to cases that take a similar view. In 13 Lah. 180,³ the gift was upheld on grounds which appear in a passage at p 183 of the report:

"It will be sufficient for our present purposes, if we confine ourselves to the case of property which is non-ancestral *qua* (a) the last male owner, (b) the heir presumptive who has given his assent, and (c) the remote heir who sues to challenge it. In such a case neither of the two last named persons has a real reversionary interest in the property in the sense in which they would have had if the property had been ancestral. Admittedly none of them has a right to control the dealings of the other with it. It follows, therefore, that if the former has given his assent *bona fide* to the alienation by the female proprietor, the latter has no right to question it. As pointed out by their Lordships of the Privy Council in 42 Mad. 523,⁵ such an alienation made with the assent of the next heir really amounts to two transactions, (1) a surrender by the widow in favour of the next heir and (2) a further transfer by the latter to the alienee. It is obvious that the remoter heir has got no right to contest either (1) or (2) and, therefore, he cannot have a *locus standi* to challenge the transaction as a whole.

It is conceded that in the present case if Mt. Jano had died without making the alienation in question, the property would have devolved on Karim Bakhsh as the next heir of the last male owner and Karim Bakhsh would have become its absolute owner, possessing full power to alienate it, with or without necessity. In that case the plaintiffs could not have contested his dealings with the property, and if this is so, it is difficult to see how they can be allowed to contest the alienation of the same property by Mt. Jano, fortified, as it is, with the assent given *bona fide* by the next heir Karim Bakhsh."

The reference to 42 Mad. 523⁵ as an authority for the proposition enunciated in the above quotation seems to have been made under some misapprehension as that case

3. ('31) 18 A.I.R. 1931 Lah. 495 : 13 Lah. 180 : 134 I. C. 197, Roshan v. Wadhawa.

4. ('08) 30 All. 1 : 11 O. C. 78 : 35 I. A. 1 (P.C.), Bajrangi Singh v. Manokarnika Bakhsh Singh.
5. ('18) 5 A. I. R. 1918 P. C. 196 : 42 Mad. 523 : 46 I. A. 72 : 50 I. C. 498 (P.C.), Rangasami Gounden v. Nachiappa Gounden.

did not state these propositions. It appears that these propositions were incorporated in the judgment from Mulla's Hindu Law Edn. 9, page 191. There these had been based on the decision in 10 Cal. 1102.⁶ In the concluding portions of the judgment, opinion was expressed that 5 Lah. 212² had been rightly decided. The *ratio decidendi* of that decision that the son of the consenting reversioner is bound by his father's consent was extended and it was held that a remote reversioner was bound by the consent of the nearest reversioner though it is obvious that one reversioner does not inherit through another even if it be held that a son inherits through his father. That an eventual reversioner claims through any one who went before him is opposed both to principle and authority. Reference in this connection may be made to the observations of their Lordships of the Privy Council in 42 Mad. 523⁵ at p. 536. The true principle on which the case in 13 Lah. 180³ was decided appears to be that of surrender or renunciation. The case was not treated as one of an alienation by a widow of a portion of her husband's estate. The basis of this decision is quite different than that of 5 Lah. 212.² One is grounded on the doctrine of surrender and the other on the rule of estoppel. The point was again agitated in A.I.R. 1936 Lah. 192.⁷ The correctness of 13 Lah. 180³ and 5 Lah. 212² was challenged. The Bench, however, upheld them without any further discussion whatsoever. A further point was raised that the gift in any case was invalid because it did not comprise the entire estate of the widow. This contention was overruled with the following remarks:

"But this point was not taken in the Court below, nor is it mentioned in the grounds of appeal presented in this Court. The question is a mixed question of fact and law and cannot be allowed to be raised for the first time at this stage. As the necessary facts have not been established, no opinion need be expressed as to whether the contention of the learned counsel is legally sound."

It is manifest that Tek Chand J. who delivered the judgment of the Bench in this case as well as in 13 Lah. 180³ did not consider that he had already held that a gift of a portion of the husband's self-acquired property by a widow in favour of a stranger would be valid if made with the consent of the nearest reversioner. In 16 Lah. 373,⁸

Addison J. while delivering the Bench judgment made an observation to the effect that a gift by a widow of her husband's self-acquired property in which she has a limited estate with the consent of the nearest reversioner is valid. The remark was *obiter* as it did not affect the decision of the case. Lastly, a learned Single Judge of this Court in A. I. R. 1941 Lah. 43⁹ observed that when an alienation of non-ancestral property by a widow is by way of gift with the consent of the next reversioner only, then it should be regarded as intended to operate as a transfer by the reversioner following on a *surrender* by the widow and consequently the remoter collaterals of the widow's husband cannot contest it. 13 Lah. 180³ was followed. The gift in that case, however, was of a portion of the estate and could not be upheld on the surrender theory. Yet that rule was somehow applied to the facts of that case. This Single Bench judgment was then considered in Letters Patent Appeal No. 9 of 1941 decided on 19th February 1943, and was affirmed. 13 Lah. 180³ and 5 Lah. 212² were mentioned with approval. The Privy Council decision in 42 Mad. 523⁵ was distinguished on the ground that their Lordships were not therein considering the case of an alienation under the customary law of the Punjab made with the consent of the presumptive heir in favour of a daughter and the daughter's children. The real point that weighed with the Bench in that case was the rule laid down by their Lordships of the Privy Council in 22 Lah. 154¹⁰ to the effect that the daughters were presumed to be preferential heirs *qua* non-ancestral property of their father to the collaterals though it was stated that the gift was being upheld on the ground of the assent of the next presumptive reversioner to it. It is unnecessary to discuss this case in any detail as it has simply followed the previous Bench decisions of this Court.

The estate of a widow under Hindu law is analogous to the estate of a widow under Punjab custom. Reference in this connection may be made to a Bench judgment of this Court in 22 Lah. 872.¹¹ The Bench judgment there was delivered by my

9. ('41) 28 A. I. R. 1941 Lah. 43 : 194 I. C. 310, Sundar v. Mt. Tabo.

10. ('41) 23 A.I.R. 1941 P. C. 21 : I. L. R. (1941) 22 Lah. 154 : I. L. R. (1941) Kar. P. C. 22 : 68 I. A. 1 : 193 I. C. 436 (P. C.), Mt. Subhani v. Nawab.

11. ('41) 28 A.I.R. 1941 Lah. 73 : I.L.R. (1941) 23 Lah. 872 : 195 I. C. 873, Khadam Hussain v. Mohammad Hussain.

6. ('84) 10 Cal. 1102 (F.B.), Nobokishore Sarma Roy v. Hari Nath Sarma Roy.

7. ('36) 23 A. I. R. 1936 Lah. 192 : 163 I. C. 85, Makhan Singh v. Mt. Mango.

8. ('34) 21 A. I. R. 1934 Lah. 860 : 16 Lah. 373 : 154 I. C. 673, Thakar Singh v. Buta Singh.

learned brother Din Mohammad J. The following quotation from the judgment elucidates this proposition:

"There is ample authority in support of the proposition that a widow under customary law enjoys the same status as a widow under Hindu law. This rule was first enunciated by Chatterji J. in 9 P. R. 1899¹² where at p. 51 he observed:

"There are strong analogies between the estate of a widow under customary law and her estate under Hindu law. Under both laws she holds for life for the purpose of maintenance with certain powers of disposition necessarily incident to her position. She is, at least in customary law, in no sense a co-sharer, and on her death the succession is not to her but to her husband. In fact her estate is one interposed for a limited purpose between that of her husband and the next heir."

This dictum was approved by Chevis J. in 205 P. L. R. 1912.¹³ In 74 I. C. 639,¹⁴ Leslie Jones and Broadway JJ. remarked:

"There is no ground for supposing that a widow who holds a life-interest in an estate under custom has any wider power of alienation than a widow who holds a similar estate under Hindu law."

In 5 Lah. 450¹⁵ Sir Shadi Lal C. J. and Martineau J. followed 74 I. C. 639.¹⁴ In A.I.R. 1936 Lah. 453,¹⁶ Coldstream J. with whom Jai Lal J. agreed, said:

"It has frequently been observed by this Court that the powers of a widow under the customary law of the Province are analogous to those of a widow governed by Hindu law. It is well settled that they are equally restricted."

In 17 Lah. 373,¹⁷ the observations made in 205 P. L. R. 1912¹³ were approvingly referred to. Without multiplying authority on this proposition it may be stated that the proposition that the nature of a widow's estate under Hindu law and Punjab custom is the same is well settled. No controversy on this point was raised at the bar. Paragraph 64 of Rattigan's Digest of Customary Law states the rule on the power of alienation by a widow thus:

"Except as provided in Para. 39 or Para. 62, no female in possession of immovable property acquired from her husband, father, grand-father, son or grandson otherwise than as a free and absolute gift can permanently alienate such property."

Paragraph 39 deals with the power of a widow to adopt an heir to her husband, while Para. 62 lays down that a widow or a mother can sell or mortgage property for a neces-

sary purpose. 8 M. I. A. 529¹⁸ may be taken to be the leading case under Hindu law on the powers of a Hindu widow to deal with her husband's estate. It was there said that the restrictions on a Hindu widow's power of alienation are inseparable from her estate and that their existence does not depend on that of heirs capable of taking on her death. This dictum of their Lordships has been appositely applied to cases under custom: *vide* 5 Lah. 450¹⁵ and 74 I. C. 639.¹⁴ The purposes for which a Hindu widow's alienation is legitimate were examined by a Full Bench of the Calcutta High Court in 40 Cal. 721.¹⁹ At p. 781 of the report the following four propositions were enunciated after an examination of the texts and the judicial decisions applicable to this matter:

(i) When a Hindu widow has alienated, in whole or in part, the estate inherited by her from her husband, the transferee can establish a good title as against the reversionary heir after her death, if he proves that the alienation was made by her for purposes of legal necessity.

(ii) When a Hindu widow has alienated, in whole or in part, the estate inherited by her from her husband, the transferee can establish a good title as against the reversionary heir after her death, if he proves that he made proper and *bona fide* enquiry as to the actual existence of legal necessity, and did all that was reasonable to satisfy himself as to the existence of such necessity.

(iii) When a Hindu widow has alienated, in whole or in part, the estate inherited by her from her husband, with the consent of the reversionary heirs, such consent may raise the presumption that the transfer was for legal necessity or that the transferee had made proper and *bona fide* enquiries and had satisfied himself as to the existence of such necessity. The quantum of consent necessary to raise this presumption depends upon the facts of each particular case, and, in all cases, the presumption raised by such concurrence on the part of the reversioners is rebuttable.

(iv) When a Hindu widow has alienated her *entire* interest in the estate inherited by her from her husband, with the consent of the whole body of persons entitled to succeed as immediate reversionary heirs, the transferee acquires a good title as against the actual reversionary heirs at the time of her death."

This decision was approvingly referred to by their Lordships of the Privy Council in 42 Mad. 523⁵ at p. 531. Section 181 of Mulla's Hindu Law, 9th Edn., summarises the Hindu law rule on the point in these terms:

"A widow or other limited heir has no power to alienate the estate inherited by her from the deceased owner except for the following purposes, namely: (i) Religious or charitable purposes. (ii) Other purposes amounting to legal necessity.

18. (1854-57) 8 M. I. A. 529 : 2 W. R. 61 (P. C.), Collector of Masulipatam v. Cavalry Vencata Narrainappah.

19. (13) 40 Cal. 721 : 19 I. C. 273, Debiprosad Chowdhury v. Golap Bhagat.

12. (99) 9 P. R. 1899, Sher Muhammad v. Phula.

13. (12) 15 I. C. 734 : 205 P. L. R. 1912, Mt. Bhagi v. Muhammad.

14. (21) 8 A. I. R. 1921 Lah. 163 : 74 I. C. 639, Mt. Dyal Kaur v. Mt. Mehtab Kaur.

15. (22) 9 A.I.R. 1922 Lah. 217 : 5 Lah. 450 : 74 I. C. 644, Gobinda v. Nandu.

16. (36) 23 A.I.R. 1936 Lah. 453 : 167 I. C. 693, Mahomed Sharif v. Teja Singh.

17. (37) 24 A.I.R. 1937 Lah. 237 : 17 Lah. 373 : 168 I. C. 628, Dhalla v. Mt. Fateh Bibi.

For purposes of the first class she has a larger power of disposition than for purposes of the second class."

In Para. 181 (B), it is stated that the power of a widow or other limited heir to alienate the estate inherited by her for purposes other than religious or charitable is analogous to that of a manager of an infant's estate as defined by the Judicial Committee in 6 M. I. A. 393.²⁰ That power is a limited and qualified one; it can only be exercised rightly in a case of need or for the benefit of the estate. The actual pressure on the estate, the danger to be averted, or the benefit to be conferred upon it, in the particular instance, is the thing to be regarded. The touchstone of the authority is necessity. It is, therefore, plain that a widow under Hindu law does not possess the power of making gratuitous transfers of the property inherited by her from her husband except when she is permitted within certain limits to do so for religious or charitable purposes. Punjab custom confers no power of gift on a widow in respect of her husband's estate. It only permits alienations for necessity provided the requirements of the widow cannot be met out of the income of the estate in her possession. A widow under Hindu law enjoys a larger power in the matter of enjoyment of the estate than a widow under custom. Under that law she is not accountable in respect of the accumulations of the income in her hands while that is not so under Punjab custom. Village communities in the Punjab have been very jealous in safeguarding their rights from the encroachments of female heirs in respect both of ancestral and self-acquired property of the last male owner.

It is necessary, before proceeding further, to point out and emphasise the distinction between the widow's power of surrender or renunciation and the power of alienation for certain specific purposes because, in my opinion, if this is not kept clearly in view it is bound to lead to confusion. Judicial opinion on the subject is unanimous, that a Hindu widow can renounce in favour of the next reversioner if there be only one or of all the nearest reversioners in degree if more than one at the moment: in other words, she can by a voluntary act operate her own death. 19 Cal. 226²¹ may be taken to be the leading Privy Council decision on

20. (1854-57) 6 M. I. A. 393 : 2 Suth. 29 : 1 Sar. 552 : 18 W. R. 81 (P. C.), Hanooman Persaud Panday v. Mt. Babooee Munraj Kunweree

21. ('92) 19 Cal. 236 : 19 I. A. 30 : 6 Sar. 88 (P. C.), Behari Lal v. Madho Lal Ahir Gayawol.

this subject. Lord Morris, while delivering the judgment of the Board, said :

"It may be accepted that, according to Hindu law, the widow can accelerate the estate of the heir by conveying absolutely and destroying her life estate.

It was essentially necessary to withdraw her own life estate so that the whole estate should get vested at once in the grantee."

These observations gave final sanction to the doctrine of surrender enunciated by the High Courts in India. The following opinion of Garth C. J. and Mitter J., in 10 Cal. 1102⁶ was referred to with approval :

"A surrender, strictly speaking, can only be made by one who has a particular estate, (such as an estate for life), to the person who has the reversion, or remainder immediately expectant, on the determination of that estate.

What is usually therefore called a 'surrender' of a Hindu widow's estate is more properly a 'relinquishment' of it in favour of her husband's heirs. If she died a natural death, those heirs would succeed; or if she were to become a *byragee*, or otherwise die a civil death, the result would be the same. And as I take it to be clear that when her husband died, she might, if she had so pleaded have disclaimed her estate, there would seem nothing wrong or objectionable in her relinquishing her estate at any time in favour of her husband's heir for the time being, after she had once accepted it."

The matter was again considered by their Lordships in 42 Mad. 523⁵ and it was there said :

"It is settled by long practice and confirmed by decision that a Hindu widow can renounce in favour of the next reversioner if there be only one or of all the reversioners nearest in degree if more than one at the moment. That is to say, she can so to speak by voluntary act operate her own death."

In this Province the point was considered by Chatterji J. in 17 P. R. 1902.²² While discussing a previous case in 9 P. R. 1899¹³ the learned Judge made the following observations :

"It is a case of surrender by the widow of her whole estate. She, as it were, stood apart and declined to take her inheritance as the widow of her husband, and let the next reversioner come in. The decision is based on the analogy of Hindu law, as administered in the Lower Provinces of Bengal, and is the first attempt to extend the principle of acceleration of the reversioner's estate to cases governed by the customary law of the Punjab. There is much similarity between the two systems of law, which probably have a common origin, and the view of the Calcutta High Court has been approved by their Lordships of the Privy Council in 19 Cal. 236,²¹ and by some of the Judges of the Madras High Court, who decided the Full Bench case in 21 Mad. 128.²³ It may be taken as settled, for the purpose of the present discussion, that Mt. Bhari was competent to relinquish her widow's estate, and thereby to accelerate the succession of the plaintiffs to the property left by Nura, but, in

22 ('02) 17 P. R. 1902, Wazir Chand v. Makhu.

23. ('98) 21 Mad. 128, Marudamuthu Nadan v. Srinivasa Pillai.

my opinion, it is essential that she should give up her whole estate and not merely a portion of it. It appears to me that this is the only rational and logical conclusion that can be deduced from the principle of relinquishment. It is the fiction of the intermediate heir being non-existent that gives the reversioner the right to step into succession, just as he would do if the heir had died. But it is necessary for this fiction that the widow should step aside altogether and completely efface herself. She does not by her act clothe the reversioner with her rights at all. She takes herself off the line of heirs and puts an end to those rights. It is a case of succession by inheritance owing to the widow's renunciation, not assignment of her rights. It appears to me to follow necessarily from the above that there cannot be a valid renunciation of a part of the estate which can give rise to a right of succession to the reversioners to that part. Two heirs belonging to different classes, one of whom excludes the other, cannot succeed to the estate at the same time. Yet this is the consequence which must ensue if the widow of Nura as such holds part of her husband's estate and can accelerate the succession of her reversioners to another part by an act of surrender. The jural conception involved in the succession of an heir, at least under the customary law of the Punjab, is that he is clothed with all the rights and succeeds to the whole estate of his predecessor capable of being transmitted by inheritance."

In a recent decision of this Court in 13 Lah. 165,²⁴ a Bench of this Court again considered this matter. Tek Chand J. who delivered the Bench judgment at page 169, observed as follows :

"It was next contended that the gift was in reality a mere 'acceleration of succession' and the gifted property should be taken to be subject to the same incidents as it would have been if it had actually descended by inheritance. In reply the learned counsel for the appellants has strenuously argued that under the custom of the Jats of Sialkot District a son, who has been adopted by a distant collateral, does not succeed to his natural father even though the latter had no other son alive at the time of his death. It is, however, not necessary to go into this question as, even if Bahadur Singh be assumed to be the next heir of Jiwan Singh, the gift can by no stretch of reasoning be treated as an 'acceleration of succession.' It is of course true that a person can surrender his estate to the next heir and thus accelerate the succession. But it is settled law that if he wishes to do so, he must completely efface himself and pass his 'whole interest in the whole estate' to the entire body of heirs who would be entitled to take it in the event of his death."

It may, therefore, be stated that both under Hindu law and custom surrender or renunciation by a widow of the whole estate in favour of the next reversioner is based on different principles than the power of alienation enjoyed by her and the doctrine of surrender cannot be invoked in cases of alienation of a part of her husband's estate. There cannot possibly be a piecemeal surrender by the widow of her husband's estate

in favour of the next reversioner. She cannot operate her death by instalments while she can certainly alienate the property in her possession piecemeal and in instalments. It will now be convenient to consider the question, namely, whether an alienation by a widow of a portion of her husband's estate in favour of a stranger which otherwise would be invalid is validated by the consent of the next reversioner. In other words, whether a widow can gift away a part of her husband's property with the blessings of her next reversioner and thus deprive those who might be the eventual heirs on the date of widow's death. Pigot J., in 10 Cal. 225²⁵ made the following pertinent observations on this point :

"Were it necessary to decide whether or not an alienation by a widow and next reversioner without the consent of subsequent reversioners is binding on them, I am ready to decide the negative of that proposition It appears to me difficult to meet the argument suggested by Mr. Mayne in his work on Hindu Law, S. 547: 'It must be remembered that where an estate is held by a female, no one has a vested interest in the succession. Of several persons then living one may be the next heir in the sense that, if he lives, he will take at her death in preference to any one else then in existence. But his claim may pass away by his own death, or be defeated by the birth or adoption of one who would be nearer than himself. It certainly does seem to be commonsense that the person who turns out to be the actual reversioner should not find his rights signed away by the consent of one who when he consented had a preferable title in expectation, but who in the actual event proved to have no title at all.' I can see no answer to that argument in justice and I do not think that the authorities as they now stand would bear me out in dissenting from it."

The matter subsequently came up before a Full Bench of the Calcutta High Court in 10 Cal. 1102⁶ and it was said :

"To allow the widow to relinquish her estate to the next male heir of her husband, is one thing ; but to allow her to sell the whole inheritance, without any legal necessity, merely with the consent of the next male heir, so as to bar the rights of other heirs of her husband in the future, is another thing. I confess, if we were now considering this last question for the first time, I should have great doubt whether the mere consent of the next heir to an absolute transfer by the widow ought to give such effect to that transfer, as to make it valid as against the person who may be the heir of the husband at the time of the widow's death. It would, of course, bind the person so consenting to it, and all persons claiming under him, but whether it ought to bind any other heirs of the husband is another matter."

If the matter was *res integra* with great respect I would have no hesitation in recording my assent to the observations above quoted. I cannot see how an alienation otherwise unauthorized can acquire sanctity

24. ('32) 19 A. I. R. 1932 Lah. 85 : 13 Lah. 165 : 133 I. C. 884, Jagtar Singh v. Ragbir Singh.

25 ('84) 10 Cal. 225, Gopeenath Mookerjee v. Kally Doss Mullick.

merely by the blessings of a person who himself has no right in the property but is merely an expectant heir and which expectation may never come to fruition. The blessings of a mere chance-holder cannot be recognized in law for the purpose of perfecting a title which otherwise is imperfect. The learned Judges in 10 Cal. 1102,⁶ however, held that as there was a long course of authority in that Court for the view that a widow could validly sell the *whole* inheritance with the consent of the next male heir, a contrary decision could not be taken, because it would be unjust to throw a cloud upon titles acquired by virtue of those decisions. 10 Cal. 1102⁶ is, therefore, authority for the proposition that under Hindu law if a widow transfers *the whole of the inheritance* with the consent of the next male heir but without any legal necessity, it bars the rights of other heirs of her husband in the future. This case, however, does not furnish any precedent for the view that if the transfer is only of a portion of the estate of the husband by the widow, it is validated by the consent of the presumptive reversioner. This rule was deduced by an extension of the doctrine of surrender. It was said that if the widow is competent to relinquish an estate to the next male heir of her husband, it follows that the logical consequence is that she can alienate it merely with his consent, without any legal necessity. This extension of the rule of surrender seems to have been approvingly referred to by their Lordships of the Privy Council in 42 Mad. 523⁵ at page 533, wherein the following observations occur :

"The surrender once exercised in favour of the nearest reversioner or reversioners the estate became his or theirs, and it was an obvious extension of the doctrine to hold that, inasmuch as he or they were entitled to convey to a third party, it came to the same thing if the conveyance was made by the widow with his or their consent."

In this situation it may be taken as settled that where a widow governed by Hindu law effaces herself and effects a total alienation of the whole of the estate in her possession in favour of a stranger with the consent of the next presumptive reversioner or reversioners, that alienation is valid and cannot be impugned by the actual heir at the time when succession opens out. It is assumed in such a case that at the time of the alienation succession opened out in favour of the next heir and he took the estate, and his consent to the alienation amounted to a conveyance by him of the surrendered property in favour of the stranger. This proposition is open to

a number of objections. It seems strange that mere consent should be regarded as equivalent to a conveyance by the reversioner in favour of a stranger, particularly when the widow never gave the property to the next heir but gave it directly to the stranger. Most likely she would never have given it to him, even if he wanted it and it is not even certain that if he got it, he would have ever sold it. Be that as it may, it is futile to re-open this subject. It is the principle of this decision that was applied by Tek Chand J. in 13 Lah. 180³ a case governed by the customary law. The counsel for the appellant did not challenge this view before us. It may, therefore, be laid down that under the customary law of the Punjab it is open to a widow to efface herself and give the whole estate to the next heir. Such a transaction cannot obviously be challenged by the remoter reversioners as it is beneficial to them and improves their chances of succession, or, in any case, accelerates or expedites them. It may also be said that under custom alienation of the whole interest of the widow in the whole estate to a stranger with the consent of the nearest reversioner or reversioners at the time of the alienation is valid if the whole estate is non-ancestral, on the ground that it amounts in effect to two transactions, namely, (I) a surrender in favour of the next reversioner which would vest the estate in him and (II) a gift of the estate by him to a third person. Where, however, an alienation by a widow in favour of a stranger comprises both ancestral and non-ancestral property of the last male owner, in such a case if it amounts to surrender in favour of the next reversioner and vests the estate in him then he can give away only that portion of the estate which is self-acquired and in which he acquires, by reason of the surrender an absolute interest. But the ancestral estate which he acquires by surrender, he himself cannot gift away and, therefore, a stranger cannot acquire in that estate an indefeasible interest. The remote reversioners can challenge it to that extent. A further proviso has to be added to this rule to the effect that a surrender should be a *bona fide* one and not a device to divide the estate with the reversioner.

Another matter which is no longer in the realm of controversy is the question of the effect of the consent of the next presumptive reversioner to an alienation by a widow of a part or whole of her husband's estate in her possession for consideration. In an

alienation by a widow for consideration, when it is to be supported on the ground of necessity, the consent of the nearest reversioner or reversioners at the time of the alienation will be held to afford a presumptive proof of necessity which, if not rebutted by contrary proof, will validate the transaction as a right and proper one. This was one of the propositions laid down in 40 Cal. 721¹⁹ and has since received the imprimatur of their Lordships of the Privy Council in 42 Mad. 523⁵ where the proposition has been laid down in these terms:

"When the alienation of the whole or part of the estate is to be supported on the ground of necessity, then, if such necessity is not proved *alibunde* and the alienee does not prove inquiry on his part, and honest belief in the necessity, the consent of such reversioners as might fairly be expected to be interested to quarrel with the transaction, will be held to afford a presumptive proof which, if not rebutted by contrary proof, will validate the transaction as a right and proper one."

This rule has application to cases arising under custom. The question that remains for consideration is whether a gratuitous alienation by a widow of a part of her husband's estate fortified by the consent of the reversionary heir is valid. In this connection it would be pertinent to refer to the following observations of their Lordships of the Privy Council in 42 Mad. 523⁵ at p. 532 of the report:

"It has been suggested that the expressions in 19 Cal. 236²¹ only meant that the widow should retain no interest in what was surrendered, and that therefore a partial surrender provided that the surrender was absolute as to that part was valid. This, however, is quite against the principle on which the whole transaction rests. As already pointed out, it is the effacement of the widow—an effacement which in other circumstances is effected by actual death or by civil death—which opens the estate of the deceased husband to his next heirs at that date. Now there cannot be a widow who is partly effaced and partly not so, and consequently the suggestion was in their Lordships' view rightly rejected by the Calcutta Full Bench in 40 Cal. 721¹⁹ already cited and by the Full Bench in Madras in 21 Mad. 128²³ and by all the learned Judges in this case."

It is obvious, therefore, that such a partial alienation cannot be supported on the doctrine of surrender. The question for consideration then is whether it can be supported on any other ground. In Mayne's Hindu Law, 10th Edn., this matter has been discussed at p. 794 in these terms:

"Where the alienation is without consideration and is therefore in form or in substance a gift, the reversioner's consent cannot possibly be held to be one in respect of an alienation for value for purposes of necessity and the transaction therefore cannot stand in spite of the consent. In all cases of partial alienation, where necessity is negatived either because the alienation is in favour of a

volunteer or because actual proof is forthcoming of want of necessity, the consent of the reversioner is wholly ineffectual as against anyone but himself. But if the alienation be total and the reversionary heirs who consent be the nearest, it would fall within the doctrine of surrender."

All the other commentators on Hindu law have expressed a similar opinion. This opinion is in the main based on the authority of 42 Mad. 523⁵ in which previous Privy Council decisions were reviewed. In this connection the following observations of their Lordships occurring at p. 534 may be cited:

"For first if mere consent as such of the reversioner could validate alienation, then the rule as to total surrender would be an idle rule. And secondly mere consent could only validate on the theory that the reversioner together with the widow represented the whole estate. But that is impossible unless the reversioner has a vested interest, whereas it is settled that he has only a *spes successionis*." 8 M. I. A. 529¹⁸ is the first Privy Council case in point of time that examined this question. In that case it was said:

"On the other hand, it may be taken as established that an alienation by a widow which would not otherwise be legitimate, may become so if made with the consent of her husband's kindred. . . . The exception in favour of alienation with consent may be due to a presumption of law that where that consent is given the purpose for which the alienation is made must be proper."

It appears that the consent was considered as affording evidence that the alienation was made under circumstances which rendered it lawful and valid. These observations can only refer to a case of an alienation made for consideration and could not relate to a gratuitous alienation. In that case it was declared that the Crown, taking by escheat, had the same right to impeach an alienation by a widow which the next heirs of the husband would have had, and the widow was not entitled to alienate without the consent of the Crown, except in so far as she could have alienated without the consent of the next heirs of the husband, if such there had been, but that the respondent was, at all events, entitled to a charge upon the estate and to be paid and satisfied thereout, the full amount of all such of the advances, if any, made by the respondent's father to the widow as were made for purposes for which, according to the Hindu law, she would have been entitled to alienate the estate as against the next heirs of her husband, if such there had been, in so far as she had not other estate of her husband to answer such purposes. It is clear that their Lordships in that case were dealing with an alienation for consideration and that in such a case consent afforded presumptive proof that the alienation was a proper one. The

next decision of their Lordships of the Privy Council is 41 Cal. 793,²⁶ in which it was observed that consent of reversioners was looked on as affording evidence that the alienation was under circumstances which rendered it lawful and valid. Reliance was principally placed by the learned counsel for the respondent on the decision of their Lordships of the Privy Council in 30 ALL. 1.² In that case a suit was brought for cancellation of certain sale-deeds executed by a widow. These sale-deeds had been ratified and confirmed by some of the possible reversioners to the estate. One of the defences raised was that the deeds of sale executed by the widow were binding on the plaintiffs not only because of the circumstances under which they were executed but also in consequence of the affirmance of the said deeds by the deeds of ratification executed by the reversioners. Their Lordships held that

"a Hindu widow in possession of her husband's estate as his heir has power, apart from legal necessity, to alienate the estate with the concurrence of the reversionary heirs so as to bind the persons who are the next reversioners when the succession opens out on her death."

It was also ruled that ordinarily the consent of the whole body of persons constituting the next reversion should be obtained, and that it was immaterial whether the concurrence of the reversioners was given at the time the alienation was made or whether the transaction was subsequently ratified. As I have already stated, their Lordships in this case were dealing with the case of an alienation that had been made for consideration. This Privy Council decision came up for consideration before a Full Bench of the Madras High Court in 31 Mad. 366.²⁷ The learned counsel for the respondent emphasized the following observations made by Wallis J. which occur at p. 374 of the report in support of his contention:

"Further, in so far as, in 10 Cal. 1102,⁶ the Full Bench derive the reversioner's power to validate from the widow's power to accelerate, this view is not in my opinion supported by the decisions of the Privy Council, while the actual decision of the Full Bench that a reversioner cannot validate the alienation by the widow of a part of the estate appears to be opposed to the recent decision of their Lordships in 30 All. 1.⁴ So far as I can see, their Lordships appear to treat the widow's power of acceleration and the reversioner's power of validating the widow's alienation as distinct and independent powers.

In 8 M. I. A. 529,¹⁸ it is said to be established that an alienation not otherwise legitimate may become so if made with the consent of her hus-

band's kindred. Neither here nor in the similar observations in 13 M. I. A. 209,²⁸ do their Lordships make any reference to the widow's power of accelerating the reversion as having any bearing on the reversioner's power of validating an alienation. On the other hand, when dealing with the widow's power of accelerating the reversion, in 19 Cal. 236²¹ their Lordships make no reference to the reversioner's power of validating alienations, and their Lordships' decision does not appear to affect the latter power except in so far as it shows that the widow's power of acceleration must be exercised *bona fide* and for the end designed. In the Full Bench case in 21 Mad. 128,²³ Shephard J., who delivered the judgment of the Court on this part of the case, when holding that the reversioner's power of validation must be derived from the widow's power of acceleration, and must be regarded as subject to the same condition as the widow's power of acceleration had been subjected to in 19 Cal. 236,²¹ was obliged to put aside, as mere *dicta*, the observations, referred to above, of their Lordships in 8 M. I. A. 529¹⁸ and 13 M. I. A. 209²⁸ in which there is no suggestion that the power of validation is derived from the power of acceleration and no suggestion that the power of validation can only be exercised by the reversioner in cases where the whole estate has been alienated. These observations which, in my opinion, clearly contemplate the validation by the reversioner of partial alienation are again taken by their Lordships in the recent case in 30 All. 1⁴ as their starting point in dealing with the reversioner's power to validate alienations, and, on the other hand, the decision of their Lordships in 19 Cal. 236²¹ as to acceleration is not referred to as having any bearing on the validation of alienation by the reversioner. The point to which their Lordships' attention appears to have been mainly directed is, whether the consent of the remote as well as of the next reversioners is necessary to validate an alienation, and, as throwing light on this question, they consider whether the consent of the remote reversioners is necessary to support an acceleration in favour of the next reversioners as held in Allahabad, or is unnecessary as held in Calcutta and Madras. When citing the observations of Subramania Aiyer J., in 21 Mad. 128,²³ to show that in Madras the consent of the remote reversioners is unnecessary to support an acceleration in favour of the next reversioners, and that all that is necessary is that the whole estate should be surrendered by the widow, their Lordships omit the concluding words of the passage in which the learned Judge laid down that, in case of an alienation with the consent of the next reversioners it was equally necessary that the whole estate should be alienated by the widow and that a partial alienation would be invalid. In the case before their Lordships the widow had made five successive alienations of portions of her husband's estate and had afterwards procured the consent of the next reversioners to those alienations. These five alienations comprised the whole of the estate, but their Lordships nowhere refer to this fact as having any bearing on the question of the validity of their alienations. On the contrary, their Lordships appear to hold that these five successive deeds of partial alienation were respectively validated by the subsequent ratification of the next reversioners."

26. (14) 1 A. I. R. 1914 P. C. 128 : 41 Cal. 793 :

23 I. C. 162 (P. C.), Bijoy Gopal v. Girindra Nath.

27. (08) 31 Mad. 366 (F. B.), Rangappa Naik v. Kamti Naik.

28. (69-70) 13 M.I.A. 209 : 3 Beng. L. R. 57 : 2 Suth 275 : 2 Sar. 518 : 12 W. R. 47 (P. C.), Raj Lukhee Dabee v. Gokool Chander Chowdhry.

This case, if good law, is certainly a strong authority for respondents' contention, but it seems that it stands practically overruled by the decision in 42 Mad. 523.⁵ Therein it was observed that their Lordships could not agree with a good deal of what was said in 31 Mad. 366.²⁷ Their Lordships explained the decision in 30 ALL. 1⁴ at some length and observed that the alienations in 30 ALL. 1⁴ were all made for purposes of ostensible necessity. Their Lordships declared that the decision in 30 ALL. 1⁴ did not enunciate any new and illogical extension of the law on the subject and was no authority for the proposition for which it was used by the Full Bench of the Madras Court. The decision in 42 Mad. 523,⁵ therefore, is the final pronouncement of their Lordships of the Privy Council and lays down the rule that a partial alienation by the widow of her husband's estate with the consent of the next presumptive reversioner is not valid. This matter was again mooted before their Lordships of the Privy Council in 53 Mad. 692.²⁹ That was a case of an alienation made by a widow in favour of the sons of her grandfather's daughters. The reversioners of the grandfather brought a suit challenging the alienation and claiming possession. The principal defence was that the alienation was binding as a surrender of the estate and that it had been expedited and acted upon by all the surviving members of the family including the plaintiffs. Lord Sanderson, delivering the judgment of the Board, made the following observations at p. 699 :

"This appeal, therefore, must be decided on the assumption that the daughters of Ananthakrishna did not agree to surrender their interests in the properties of their father, and that they did not consent to and acquiesce in the deeds of 22nd July 1867.

The principle applicable to the power of surrender by a Hindu widow is well settled and may be stated as follows: A Hindu widow can renounce in favour of the nearest reversioner if there be only one, or of all the reversioners nearest in degree if more than one at the moment. That is to say, she can, so to speak, by voluntary act operate her own death. The landmark of decision as to this may be taken as the case in 19 Cal. 236²¹ where, in delivering the judgment of the Board, Lord Morris said. 'It may be accepted that according to Hindu law, the widow can accelerate the estate of the heir by conveying absolutely and destroying her life estate. It was essentially necessary to withdraw her own life estate so that the whole estate should get vested at once in the grantee.' (See the judgment of the Board delivered by Lord Dunedin in 42 Mad. 523.⁵) It is clear that the widow, Thayammal, by executing the deeds in July 1867, and disposing of her

property thereby, did not renounce her interest in favour of the nearest reversioners. Her two daughters, Thailammal and Lakshmiammal, were the nearest reversioners, and they took no interest in the properties under the said deeds. The conditions, therefore, necessary to create a valid surrender by the widow Thayammal, were not present. It was, however, argued on behalf of the appellants that the surrender by the widow was valid, because the daughters Thailammal and Lakshmiammal, consented to the transactions carried out by the deeds of July 1867, so as to efface their own interests, and that consequently not only the interests of the widow, but also the interests of her daughters in the property, were effaced. Their Lordships are relieved from the necessity of expressing any opinion on the important question of law involved in this contention, in view of their above-mentioned conclusion that it was not proved that the daughters, Thailammal and Lakshmiammal, did in fact consent or acquiesce in the said transactions."

From these observations it appears that even the question whether a total alienation by a widow of her husband's estate in favour of a stranger can be validated with the consent of the nearest reversioner when it does not amount to surrender was left open, though observations occur in 42 Mad. 523,⁵ which convey a different impression. Be that as it may, the question of total surrender by the widow of an estate with the consent of the presumptive reversioner as far as Courts in India are concerned may be taken to be settled as already discussed. For the reasons given above, it must be held that a gratuitous alienation by a widow of her husband's self-acquired or ancestral property with the consent of the next reversioner is not valid and can be challenged by a remote reversioner provided his suit is not altogether a speculative one; in other words, a considerable number of other reversioners do not intervene between him and the presumptive reversioner. However, so far as the consenting reversioner and persons deriving title from him are concerned they cannot challenge the alienation and obtain a declaration that it is invalid. When a declaration is granted to a remote reversioner in the circumstances of any particular case, the decree should clearly provide that the declaratory decree will not enure for the benefit of the consenting reversioner or of persons deriving title through him. There is another rider that must be added to the rule enunciated above concerning non-ancestral property. Qua such property, the widow's alienation will become indefeasible in case succession opens out during the lifetime of the immediate reversioner who has given his consent and he becomes vested with the inheritance. The reason for this proviso is that as soon

29. (30) 17 A.I.R. 1930 P. C. 297 : 53 Mad. 692: 57 I.A. 305 : 128 I.C. 261 (P.C.), Narayanaswami Ayyar v. Rama Ayyar.

as the widow dies or succession opens out in any other manner, the immediate reversioner who has given his consent comes into possession of the estate and concerning non-ancestral part of it he enjoys power of absolute disposal. Punjab Act 1 [I] of 1920 has placed a statutory impediment in the way of next reversioners and has declared that they have no right to challenge alienations of non-ancestral property by a male owner. That being so, his consent to the widow's alienation in respect to her husband's self-acquired property, in cases where the consenting reversioner acquires the estate by inheritance, cures all defects that may have existed in the alienee's title on the equitable rule given statutory recognition in S. 18, Specific Relief Act, and applied in exactly similar circumstances in a considerable number of decisions of this Court. This, however, is not so where the consenting reversioner dies during the lifetime of the widow and never becomes vested with the inheritance. In that case by his consent he cannot sign away the rights of others. His consent in such cases cannot be deemed to be an alienation by him in favour of a stranger because he had no power to make an alienation of the property with which he was never vested. In respect of the ancestral property, the estate of the next immediate reversioner is itself limited and he cannot, therefore, by any act of his make the title of the alienee indefeasible because his own alienations can be challenged by the remoter reversioners.

Mr. Dev Raj Sawhney, learned counsel for the respondent, argued that it was late in the day to upset a series of decisions of this Court on this subject. It was urged that 21 years ago it was ruled in 5 Lah. 212² that an alienation by a widow of her husband's self-acquired property with the consent of the next reversioner was valid and that that view has been upheld in the various decisions above mentioned for a period of 21 years and that in the circumstances the doctrine of *stare decisis* had application and that even if the rule has been wrongly laid down, it should not be disturbed. The learned counsel contended that on the faith of these authorities many estates must have been transferred during the last 20 years and that the Court would be doing a grievous wrong to the transferees of those estates if the rule laid down in 5 Lah. 212² and the subsequent authorities were overruled as it would disturb titles which had been acquired on the strength of that rule. On this point

reference was also made to a recent decision of a Full Bench of this Court of which I was a member in A. I. R. 1945 Lah. 123³⁰ wherein it was held that:

"where a decision of the Courts originally wrong or an erroneous conception of the law especially of real or immovable property, has been followed for a length of time and as such has become the basis upon which rights have been regulated and arrangements as to property made, the maxim *communis error facit jus* should be applied and the view of law should not be upset."

The rule of *stare decisis* is well known but, in my opinion, has no application to the present case. In the first place the point that has now arisen has really never been decided in this Court and there is no *cursus curiæ* on the faith of which estates have been transferred in this Province. In 5 Lah. 212,² all that was held was that a son was bound by the consent of his father. That view is not being upset by our present decision. In respect of self-acquired property he may still be bound and I have already held that no decree should be given in favour of the consenting reversioner or persons deriving title through him. The decision in 5 Lah. 212² is no authority for the view that one reversioner derives title from another reversioner. Their Lordships of the Privy Council in 42 Mad. 523⁵ had finally pronounced that one reversioner does not derive his title through another. 13 Lah. 180³ and the later cases that followed it were really decided on the doctrine of surrender. That being so, the doctrine of *stare decisis* could not be invoked in support of the respondents' case. Moreover, that doctrine has no application whatsoever when a rule of law, which has prevailed in the Courts of a country, has subsequently been overruled by their Lordships of the Privy Council. In 42 Mad. 523,⁵ their Lordships have in clear and unambiguous terms ruled that alienation by a widow of a portion of her husband's estate with the consent of the next reversioner is not valid. The same rule has to be applied to cases arising under Punjab custom as the estate of a widow under custom is analogous to her estate under Hindu law. That being so, the first contention of Mr. Sawhney is devoid of force and must be repelled. On the merits of the case Mr. Sawhney relied on the Lahore authorities above discussed and on the decision of their Lordships of the Privy Council in 30 ALL. 1.⁴ I have in this judgment discussed those cases in detail

30. (1945) 32 A. I. R. 1945 Lah. 123 : I. L. R. (1945) Lah. 373 : 221 I. C. 14 (F.B. Allah Bakhsh v. Chet Ram.

and, in my opinion, those cases do not help the contention of the learned counsel in view of the latest pronouncement of their Lordships of the Privy Council in 42 Mad. 523.⁵ The result of the authorities discussed above may be summarised thus in their application to cases under the customary law: (1) When an alienation for consideration by a widow of the whole or part of the estate, whether ancestral or self-acquired, to which she has succeeded either on the death of her husband or son, or collaterally, is to be supported on the ground of necessity, the consent of the nearest reversioner or reversioners at the time of the alienation as might fairly be expected to be interested to quarrel with the transaction will be held to afford a presumptive proof which, if not rebutted by a contrary proof, will validate the transaction as a right and proper one. (2) An alienation by a widow of the estate to which she has succeeded either on the death of her husband, or son, or collaterally, if it amounts to a surrender of her own interest in the whole estate in favour of the nearest reversioner or reversioners at the time of the alienation, is a valid one. The question of necessity does not fall to be considered in that situation provided the surrender is a *bona fide* one and not a device to divide the estate with the reversioners. In a case where the next reversioner consents to a gift by her of her whole estate in favour of a stranger, this gift may be treated as a surrender by her to the nearest reversioner and a conveyance by the latter in favour of the stranger, *qua* non-ancestral property surrendered, and the remote reversioner will not be able to successfully challenge the gift concerning such property. If the gift, however, includes ancestral property, it is liable to be set aside in respect of such property at the instance of the remote reversioner. (3) A gratuitous alienation by a widow of a *part* of her husband's ancestral or self-acquired property with the consent of the next presumptive reversioner is not valid. Such an alienation will, however, bind the consenting reversioner and those who derive title from or through him. In a suit for declaration by a remoter reversioner to contest such an alienation, the declaratory decree should clearly provide that it shall not enure for the benefit of the consenting reversioner or persons deriving title from or through him. (4) A gratuitous alienation by a widow of her husband's self-acquired property with the consent of the next presumptive reversioner, though not valid at the time when made,

will become indefeasible if the consenting reversioner outlives the widow and the inheritance becomes vested in him. If a declaratory decree has already been granted in respect of such an alienation that decree will become infructuous and inoperative.

The result is that the rule laid down in Para. 68 of Rattigon's Digest of Customary Law is upheld subject to the limitations above discussed. In the light of the propositions summarised above, it is not possible to maintain the decision of the learned District Judge to the effect that the gift of Mt. Alan in favour of her daughters, defendants 2 to 5, is valid in respect of the self-acquired property of her husband. The contesting reversioner has died childless and the widow is still alive. Plaintiff now is the next presumptive reversioner. That being so, I would set aside the decree of the District Judge and would restore the decree granted to the plaintiff by the trial Judge. The cross-objections have no force as a gift of ancestral property by the widow with the consent of the next heir has never been validated by means of such consent. I would accordingly dismiss them. Parties are left to bear their own costs in this Court.

Abdul Rashid J. — I agree.

Din Mohammad J. — I agree with my learned brother in the conclusion reached by him that in the present case the gift made by a widowed mother in favour of the married sisters of her deceased son, to whose estate she had succeeded, was not valid in spite of the consent of the next reversioner who had died in the life-time of the donor herself. Further than this I need not go.

Teja Singh J. — I agree with my learned brother Mahajan J.

Mohammad Sharif J. — I agree.

G.N.

Appeal allowed.

[Case No. 36.]

* **A. I. R. (33) 1946 Lahore 193**

MUNIR AND MAHAJAN JJ.

Ratan Lal, Advocate — Petitioner

v.

*Jagadhri Light Railway Co., Ltd.
and others — Respondents.*

Civil Original Nos. 44L of 1944 and 71 of 1943, Decided on 9th April 1945, from order of Munir J., D/- 22nd January 1945.

(a) Civil P. C. (1908), O. 40, R. 1—It is wrong to say that Receiver cannot be appointed to conduct business of company except in debenture holders' action. (*Obiter*).

It is wrong to say that the appointment of a Receiver is unheard of to conduct the business of a company except in a debenture-holders' action.

Several cases can be visualized when a company Judge may exercise such a power under the provisions of O. 40 R. 1 read with S. 141, Civil P. C., or *ex debito justitiæ*. It is possible in suitable cases under the Companies Act to appoint a Receiver who may take up the business of the company and the management of its property and its affairs pending the decision of the Court in a litigation : ('25) 12 A.I.R. 1925 Cal. 817, *Dissented*. [P 195 C 2 ; P 196 C 1]

C. P. C.—

('44) Chitale, O. 40, R. 1, N. 17.

(b) Companies Act (1913), S. 38—Application under S. 38 — Directors of company are not necessary or proper parties.

A shareholder has no right to remove a director from the possession and custody of any property when he himself is claiming entry on the register of members by recourse to the provisions of S. 38. As a matter of law, the directors of a company who are in charge of the management and business of the company are not necessary or proper parties to an application made under S. 38: (1918) 1 Ch. 487, *Rel. on*. [P 196 C 2]

(c) Civil P. C. (1908), O. 40, R. 1 (2)—Application under S. 38, Companies Act—Director is stranger to these proceedings in his capacity as director—Sub-r. (2) applies.

The provisions of sub-r. (2) of O. 40, R. 1 cannot have application to cases of dispossession of a party to a suit by the appointment of a Receiver. That sub-rule has been made for the protection of third parties who are not parties to the suit. To the application under S. 38, Companies Act, the directors are neither necessary nor proper parties and the mere fact that one of them as managing director transferred his shares in favour of the applicant and in that capacity was impleaded as a party does not make him a party in his capacity of a director. For the purposes of sub-r. (2) of O. 40, R. 1 he is a stranger to these proceedings in his capacity as a director. Sub-rule (2), therefore, has full application to such a case. [P 197 C 1]

(d) Companies Act (1913), S. 38 — Judge exercising jurisdiction under S. 38 has no jurisdiction to appoint Receiver to take over management of company—O. 40, R. 1 (i), Civil P. C., does not apply.

As the power of a company Judge under S. 38, Companies Act, is a limited one and that power has been conferred for granting a relief to a shareholder in his individual and personal capacity and not in his collective capacity as representing the company or as a person interested in direct management of the affairs of the company, in exercise of that power the Court has no jurisdiction to take over the administration of the affairs of the company and to entrust it to a Receiver. Provisions of O. 40, R. 1 (i), Civil P. C., cannot, therefore, be applied to applications made under S. 38, Companies Act. [P 197 C 2 ; P 198 C 2]

C. P. C.—

('44) Chitale, O. 40, R. 1, N. 17.

Ved Vyas and Balraj Tuli— for Petitioners,
C. L. Aggarwal, R. L. Chawala and Anand Mohan Suri — for Respondents.

Mahajan J.— The facts of this case are fully stated in the reference order of my learned brother Munir J., dated 22nd January 1945 and need not be re-stated in full but in order to appreciate the point involved it is necessary to mention them briefly in

this order. The Jagadhri Light Railway Co. Ltd., is a Joint Stock Company having its registered office at Jagadhri. It has a fully paid up capital of Rs. 1,20,000 divided into 600 shares of Rs. 200 each. Four hundred and fifty shares in this company are held by seven members of the family of late L. Bansilal. Three branches of his descendants hold 150 shares equally divided among themselves. The family of Bansilal owed debts to a number of persons. Kishori Saran who is the head of the family, in the year 1937 took proceedings under the U. P. Encumbered Estates Act, for relief in respect of these debts. On 13th April 1937, Special Judge passed a decree in favour of the creditors against the family. In execution of the decree the shares held by all the members of the family were sold. Three hundred shares were purchased by Hari Ram petitioner in Civil Original No. 43 of 1943 and 150 shares were purchased by Rattan Lal, Mahanbir and Bakhatawar Singh petitioners in Civil Original No. 71 of 1943.

The purchasers of these shares made an application to this Court under the provisions of S. 38, Companies Act, and prayed for rectification of the register of members by substitution in the register the names of the petitioners in place of the names of seven members of the family. The decree that the Judge exercising jurisdiction under the U. P. Encumbered Estates Act made was also in favour of the company itself against all the seven members of the family. In other words, one of the decree-holders was the Jagadhri Light Railway Co. Ltd. The company did not take out execution proceedings. Under Art. 49 of the articles of association it had first and paramount lien upon all the shares of any shareholder for his debts, liabilities and engagements to or with the company and the directors were given power to sell the shares to enforce such lien. The directors acting under the authority of this article on 14th May 1943 forfeited the shares which had already been sold to the petitioners at the court sale. After forfeiture, the directors allotted the shares to other persons who are respondents in Civil Original No. 43 of 1943. The directors immediately proceeded to enter the names of these persons in the register. Subsequently the directors proceeded to amend some of the articles of association of the company. By these amendments two shareholders could constitute a quorum for a meeting of the company and a person could be elected director without any share qualification

whatsoever. The amended article deleted cl. (e) of Art. 102 which stated that a director would automatically cease to be such if he did not hold 15 shares in the company. On 13th November 1943 three persons were elected directors according to the provisions of the amended articles of association. None of these persons held any share in the capital of the company, and, it is one of these directors who was authorised to forfeit the shares of the seven members of the family in order to meet their liability to the company under the decree of the Special Judge.

In the rectification application made under S. 38, Companies Act, to this Court the validity of the general meeting held to amend the articles of association and of the procedure adopted to forfeit the shares is being questioned. Pending decision of this petition under S. 38, Companies Act, for rectification of the register of members an application was made for appointment of a Receiver who could take charge of the property of the company and could manage it *ad interim*. This matter was heard by the learned company Judge who felt that the circumstances were such in which it was just and convenient to appoint a Receiver if the power to make such an appointment was vested in the Court while exercising jurisdiction under S. 38, Companies Act. On behalf of the respondent, reliance was placed on a single Bench judgment of the Calcutta High Court in A.I.R. 1925 Cal. 817¹ in which the following observations were made:

"But I must say that it is the first time that I have heard of a Court assuming jurisdiction to appoint a Receiver to conduct the business of a company unless the Receiver is appointed in a debenture-holders' action when the business and assets of the company have been charged with payment of the claims of the debenture-holders." My learned brother who heard this matter doubted the correctness of these observations particularly in view of the provisions of O. 40, R. 1, Civil P. C., read with S. 141 of the same Code. In view of the importance of the matter he, however, referred the case to a Division Bench for decision.

The short question for decision before us is whether a company Judge exercising jurisdiction under the provisions of S. 38, Companies Act, has jurisdiction to appoint a Receiver to take over the management and business of the company and also take over possession of its property pending decision of that application and whether in such a

situation the provisions of O. 40, R. 1 read with S. 141, Civil P. C., have application. The general question whether a Judge exercising jurisdiction under the Companies Act in certain kinds of cases can appoint a Receiver or not does not arise in this case. It is not possible to endorse the view of the Single Judge of the Calcutta High Court to the effect that the appointment of a Receiver is unheard of to conduct the business of the company except in a debenture-holders' action. Several cases can be visualized when a company Judge may exercise such a power under the provisions of O. 40, R. 1 read with S. 141, Civil P. C., or *ex debito justitiæ*. One of such cases is the case in 14 Lah. 68.² A Single Judge of this Court held that apart from S. 185 the Court possesses ample powers *ex debito justitiæ* to pass *interim* orders for the protection and preservation of the subject-matter in dispute, pending the result of the litigation: *vide*, Ss. 94 and 151 and Orders 39 and 40, Civil P. C., read with R. 95 of the rules framed by this Court under the Companies Act. It is, no doubt, true that ordinarily when the affairs of a company reach a deadlock then the appropriate procedure is the one provided for in the winding up chapters of the Companies Act and by the appointment of an *ad interim* liquidator. But there may be cases where winding up is not just and equitable and otherwise there are no grounds to wind up the company which is solid and yet the Court may have to protect the property from being alienated and wasted owing to mutual bickerings and troubles among the directors and the Court may be called upon to hold a meeting of the company in exercise of the powers given to it by the Act in order to elect new directors or to undo the effect of certain *ultra vires* resolutions. I am not, therefore, prepared to subscribe to the wide proposition enunciated in A. I. R. 1925 Cal. 817¹ that it is an unheard of proposition to appoint a Receiver to conduct the business of the company. I am further supported in this view by the fact that there are several English cases in which a Receiver has been appointed to conduct the business of a company. Reference in this connection may be made to the cases in (1925) W. N. 11,³ (1874) 16 Eq. 298⁴ and the case in (1874) 16 Eq.

2. (1933) 20 A. I. R. 1933 Lah. 437 : 14 Lah. 68 : 142 I. C. 766, Haribans Prasad v. National Sugar Mills, Delhi.

3. (1925) 1925 W. N. 11 : 159 L. T. 29, Stanfield v. Gibbon.

4. (1874) 16 Eq. 298: 21 W. R. 835, Featherstone v. Cooke.

1. (1925) 12 A. I. R. 1925 Cal. 817 : 52 Cal. 513 : 88 I. C. 826, Kailash Chandra Datta v. Sadar Munsif.

303.⁵ These were no doubt cases in which the Receiver was appointed in an action and not in summary proceedings. But I see no difference in the exercise of Court's powers to appoint a Receiver whether the matter comes to it in exercise of its ordinary civil jurisdiction. Therefore, in my view, it is possible in suitable cases under the Companies Act to appoint a Receiver who may take up the business of the company and the management of its property and its affairs pending the decision of the Court in that litigation. The matter, however, in my view is different so far as the exercise of jurisdiction under S. 38, Companies Act, is concerned. That section lays down that :

"(1) If —

(a) the name of any person is fraudulently or without sufficient cause entered in or omitted from the register of members of a company ; or

(b) default is made or unnecessary delay takes place in entering on the register the fact of any person having ceased to be a member, the person aggrieved, or any member of the company, or the company, may apply to the Court for rectification of the register.

(2) The Court may either refuse the application or may order rectification of the register and payment by the company of any damages sustained by any party aggrieved, and may make such order as to costs as it in its discretion thinks fit."

It is clear from the plain reading of the section that the jurisdiction of the Court under this section is a limited one. The only relief that can be granted under this section is the one concerning rectification of the register and, in some cases, payment by the company of damages sustained by any party aggrieved. The Court cannot grant any relief under this section regarding the management of the property of the company or for conducting the business of the company. It is an admitted proposition of law that an individual share-holder has no voice in carrying on the business of a company and is not concerned with the management of its affairs. The property owned by the company is under the management of its directors so is the business of the company. The only powers that share-holders possess are the statutory powers of receiving a dividend, of voting at the time of the ordinary and extraordinary meetings of the company and similar other powers, but no individual share-holder can ever claim that he is an owner of any part of the property of the company or he is entitled to conduct the business of the company or manage its affairs. It is the directors of the company who are invested with the management and

business of the company. Under the provisions of S. 38, Companies Act, no power is given to the Court to remove the directors from the management of the company or restrain them from carrying on its business. That relief is wholly foreign to the jurisdiction conferred on the Court by S. 38, Companies Act. In these circumstances can it be said that the provisions of O. 40, R. 1, read with S. 141, Civil P. C., have application and a company Judge in dealing with an application made by a share-holder for rectification of the register of members under the provisions of this section has jurisdiction to appoint a Receiver? Order 40, R. 1, is in these terms :

"Where it appears to the Court to be just and convenient the Court may by order —

(a) appoint a receiver of any property whether before or after decree ;

(b) remove any person from the possession or custody of the property ;

(c) commit the same to the possession, custody, or management of the receiver; and

(d) confer upon the receiver all such powers as to bringing and defending suits,...

* * * *

(2) Nothing in this rule shall authorize the Court to remove from the possession or custody of property any person whom any party to the suit has not a present right so to remove."

A share-holder has no right to remove a director from the possession and custody of any property when he himself is claiming entry on the register of members by recourse to the provisions of S. 38, Companies Act. As a matter of law the directors of a company who are in charge of the management and business of the company are not necessary or proper parties to an application made under S. 38, Companies Act. In this connection reference may be made to the case in (1918) 1 Ch. 487.⁶ This was a case under S. 32, Companies (Consolidation) Act, 1908, for rectification of the register and it was held that directors of the company were not properly joined as respondents notwithstanding that their unjustifiable acts at board meetings may have conduced to the application. At p. 491 of the report the following observations occur :

"But supposing the whole board had improperly—that is without justification—refused to register them would the whole board be the proper parties to join as respondents to a motion of this nature? In my view they would not. The directors are the agents of the company and in law it is the company which is legally responsible for the unjustifiable acts of its agents and the directors are not to my mind necessary or proper parties to an application of this kind."

5. (1874) 16 Eq. 303 ; 21 W. R. 836, Trade Auxiliary, Co. v. Vickers.

6. (1918) 1 Ch. 487 ; 87 L. J. Ch. 290 ; 118 L. T. 591, In re Keith Prowse and Co. Ltd.

The proposition was not disputed by Mr. Ved Vyas, the learned counsel for the petitioners. He, however, contended that in the present case the managing director was the transferor of the shares to the applicants and therefore, as transferor he was impleaded as a party, and as he is a party, therefore, the provisions of Order 40, R. 1, sub-r. (2) do not affect the case. It is no doubt true that the provisions of sub-r. (2) of O. 40, R. 1, cannot have application to cases of dispossession of a party to a suit by the appointment of a Receiver. That sub-rule has been made for the protection of third parties who are not parties to the suit but in my view that sub-rule has full application to the facts and circumstances of the present case. To the application under S. 38, Companies Act, the directors are neither necessary nor proper parties and the mere fact that one of them as managing director transferred his shares in favour of the applicants and in that capacity was impleaded as a party does not make him a party in his capacity of a director. For the purposes of sub-r. (2) of O. 40, R. 1, he is a stranger to these proceedings in his capacity as a director. The applicants as alleged shareholders, even if their prayer for rectification of the register of members is granted, would not automatically be entitled to enter into possession of the property of the company and to conduct its business. After having got entry on the register they as shareholders may be entitled to call a meeting of the company and to remove the directors from the management of the company, but this will not be as a result of the Court's order under S. 38, Companies Act, but as a result of the exercise of the powers vested in the applicants as share-holders after the rectification order.

In my judgment any person applying for rectification of the register of members under S. 38, Companies Act, cannot disturb the business of the company or its management during those proceedings. Once he acquires a status he may be able to take appropriate proceedings for bringing about a change in the business and the management of the company but not till then. It is clear that the Court's jurisdiction under S. 38, Companies Act, comes to an end as soon as the rectification order is made. It is obvious that its order in the receivership application would also terminate at that stage. I asked Mr. Ved Vyas as to whom the Court would order the Receiver to hand over the business of the property on that date. All that Mr.

Ved Vyas could say that the Court should wait till his clients had taken some action in the matter of the removal of directors. He went to the length of suggesting that the Receiver himself may have to call a meeting of the share-holders to elect new directors to whom when elected, the Receiver will hand over the management of the affairs and the property of the company. That answer itself suggests the limits of the powers of the Court exercising jurisdiction under S. 38, Companies Act. In my view this section only gives powers to correct the register of the company and confers no power to interfere with any other matter or to pass any *ad interim* order in regard to the conduct of the business of the company. In any case, it does not empower the Court to remove the directors who are really no parties to this case from the management of the affairs and the property of the company, and in view of sub-r. (2) of O. 40, R. 1, that power cannot be exercised.

It is no doubt true that under S. 141, Civil P. C., a judge exercising jurisdiction under the Companies Act can have recourse to the provisions of the Code of Civil Procedure so far as those provisions may be applicable to the facts and circumstances of that case. I have, however, no hesitation in holding that provisions of O. 40, R. 1, cannot be applied to applications made under S. 38, Companies Act. The scope of that section is a restricted one and the appointment of a Receiver in the exercise of jurisdiction conferred by that section is to say the least of it unjustified. Mr. Ved Vyas was not able to cite a single case either of the Indian Courts or the English Courts where a Receiver had been appointed in proceedings for rectification of the register of members under the Companies Act. He in the first instance placed reliance on certain decisions of the various High Courts in India to the effect that a Receiver can be appointed even in a declaratory suit or even in cases where the relief claimed is one which cannot be executed by an application for execution. That may be so, but in those cases it is the title to the property regarding which a declaration is claimed and the property itself is the subject-matter of the suit. In order to preserve the property intact pending litigation the power to appoint a Receiver may be exercised. In a petition under S. 38, Companies Act, the subject-matter of litigation is not the property of the company or its business at all. It is the individual right of the share-holder concerned that has to be

adjudicated. Those rulings, therefore, have no application whatsoever to the present situation. Mr. Ved Vyas then cited certain cases to the effect that the scope of sub-r. (2) of O. 40, R. 1, is limited to persons who are strangers to the suit. That proposition again is unexceptionable but does not apply to the present case because as already pointed out the directors are strangers in the eye of law to applications made under section 38, Companies Act.

Lastly, Mr. Ved Vyas placed reliance on two English cases. Both of them are reported in L. R. XVI Equity Cases and they have already been mentioned. The first case, (1874) 16 Eq. 303,⁵ was one in which a bill was filed to the effect that a requisition signed by a number of share-holders to hold an extraordinary meeting of the company in order to constitute a proper governing body had not been honoured by the directors. In this motion was made for the appointment of a Receiver, till a proper board of directors could be constituted. In this case Sir R. Malins V. C., ordered the appointment of a Receiver. In order to give relief to the plaintiff in that case it was necessary also to rectify the register but the rectification of the register was not the relief claimed in the action. The relief claimed in the action was the removal of the existing directors and the appointment of a new governing body of the company. The question of management of the company was directly before the Court. It was not the individual right of the plaintiff for entry on the register of members that was the subject-matter of litigation in that case. Mr. Ved Vyas argued that the basis of the relief claimed in that suit was in the first instance the rectification of the register. That may be so. There is a good deal of difference between the basis of a right and the relief claimed in an action. If the Court has to grant relief to the plaintiff which concerns the management and the business of the company, then in exercise of that power the Court may take over the management of the company *ad interim*. That case has, therefore, no application when the matter before us is of rectification of the register *simpliciter* and the grant of relief to the applicant in his individual capacity as a member, and not to him either on behalf of the company or on behalf of the directors.

The second case relied upon is the case in (1874) 16 Eq. 298.⁴ In that case there was a dispute between different members of the governing body of the company which pre-

vented its affairs being carried on properly. A suit was brought to settle that matter and a Receiver was appointed during the pendency of the suit to take over the business of the company. That again was not a case for individual relief by a share-holder but the Court was asked to grant relief regarding the management of the affairs of the company. That case, therefore, is no authority for exercise of jurisdiction concerning appointment of a Receiver under S. 38, Companies Act. Moreover, it must be pointed out that under the English law there is no provision corresponding to sub-r. (2) of O. 40, R. 1, and the exercise of jurisdiction for appointing a Receiver is much more comprehensive than is conferred by the Code of Civil Procedure.

Mr. Ved Vyas also placed considerable reliance on the single Bench judgment of Tek Chand J., in 14 Lah. 68.³ In that case it was held that power was given by the express language of section 185, Companies Act, to pass interlocutory orders *pendente lite* for the protection from misappropriation or waste by persons standing in a fiduciary position of the property of the company. Section 185 itself gives the Court powers in the management of the affairs of the company to exercise such a jurisdiction. That section again is not concerned with the personal status of the share-holder. That case, therefore, does not furnish any authority to Mr. Ved Vyas in support of his contention. In my judgment, as the power of a company Judge under S. 38, Companies Act, is a limited one and that power has been conferred for granting a relief to a share-holder in his individual and personal capacity and not in his collective capacity as representing the company or as a person interested in direct management of the affairs of the company, in exercise of that power the Court has no jurisdiction to take over the administration of the affairs of the company and to entrust it to a Receiver. The directors of the company cannot be removed from the management of the affairs and the property of the company during such proceedings and such appointment means the removal of directors from managing the property of the company. For the reasons given above the application for the appointment of a Receiver is dismissed and the case is remitted to the learned company Judge for proceeding with the original application. The costs in this matter will abide the event.

Munir J. — I agree,

D.S./D.H.

Case remitted.

[Case No. 37.]

A. I. R. (33) 1946 Lahore 199

MUNIR J.

Ram Parshad — Convict — Petitioner
v.*Emperor.*

Criminal Revn. No. 1007 of 1945, Decided on 24th May 1945, from order of Sessions Judge, Karnal, D/- 14th April 1945.

Punjab Foodgrains (Movement Control) Order (1943), Cl. 6 as amended by Notification No. 15576 St (FG) 44/100400, dated 18th November 1944 — Order of confiscation should be passed in every case of contravention of Order unless special reasons exist.

In every case where the provisions of the Punjab Foodgrains (Movement Control) Order 1943 have been contravened, an order of forfeiture must be made under cl. 6 of the order as amended by Notification No. 15576 St (FG) 44/100400 dated 18th November 1944 as a matter of course unless for special reasons the Court is of the opinion that such order should not be made. [P 199 C 2; P 200 C 1]

Shamair Chand — for Petitioner.*A. R. Khosla* — for the Crown.

Order.—Ram Parshad and four others, who are carriers, were convicted and sentenced to various terms of imprisonment and fine under R. 81 (4), Defence of India Rules, for attempting to export, without a permit, 80 maunds of wheat from the Punjab into the United Provinces in contravention of S. 3, Foodgrains (Movement Control) Order, 1943. The wheat attempted to be exported was ordered to be forfeited to His Majesty. On appeal the convictions and the order of forfeiture were upheld but the sentences were reduced. Ram Parshad now applies for revision of his conviction and sentence and the order of forfeiture. When this petition came up before me for admission, I saw no reason to interfere with the conviction and the sentence but issued notice on the ground of the alleged illegality of the order of forfeiture. At the last hearing I was surprised to find that in reply to the notice the learned District Magistrate had reported that Crown representation was not necessary in this case. As the point was of considerable importance, I adjourned the hearing and directed the Advocate-General to appear himself or to arrange for Crown representation. I have now heard Mr. Shamair Chand for the petitioner and Mr. A. R. Khosla for the Crown.

Mr. Shamair Chand relies on sub-r. (4) of R. 81, Defence of India Rules, an unreported case "*Ram Sarup v. The Crown*" (Criminal Revn. No. 1613 of 1944) decided by my brother Mehr Chand Mahajan, the Division Bench decision of the Bombay High Court

in A.I.R. 1944 Bom. 247¹ and the Full Bench decision, also of the same High Court, in A.I.R. 1944 Bom. 292² and contends that the order of forfeiture is illegal because such order cannot be made under the general provisions of S. 517, Criminal P. C., and can be made only if the order, which is alleged to have been contravened, permits it to be made. The argument is perfectly sound but it proceeds on a wrong assumption. Sub-rule (4) of R. 81, Defence of India Rules, provides that if any person contravenes any order made under this rule, he shall be punishable with imprisonment for a term which may extend to three years or with fine or with both, and, if the order so provides any Court trying such contravention may direct that any property in respect of which the Court is satisfied that the order has been contravened shall be forfeited to His Majesty. The order which has been contravened in the present case, is the Foodgrains (Movement Control) Order, 1943, made by the Governor of the Punjab in exercise of the powers conferred by sub-r. (2) of R. 81, Defence of India Rules. The point made by Mr. Shamair Chand is that sub-r. (4), which is more particular, excludes the operation of S. 517, Criminal P. C., which is a general provision, and that the order of confiscation can be made only if the Foodgrains (Movement Control) Order so provides. This interpretation of sub-rule (4) is supported by the phraseology of the sub-rule itself and the three authorities relied upon. There can be no doubt that this contention is correct if the premises be correct. The argument is founded on the assumption that the Foodgrains (Movement Control) Order contains no provision for an order of forfeiture. This assumption, however, is not correct because of Notification No. 15576-ST (FG)-44/100400, dated 18th November 1944, issued by the Governor of the Punjab in exercise of the powers conferred by sub-r. (2) of R. 81, Defence of India Rules, the Foodgrains (Movement Control) Order was amended and cl. (6), as amended, reads as follows:

"If any person contravenes the provisions of this Order, then without prejudice to any other punishment to which he may be liable, any Court trying the offence shall order that the stock or quantity of foodgrains, together with the packages and coverings thereof, in respect of which the

1. ('44) 31 A. I. R. 1944 Bom. 247 : I.L.R. (1944) Bom. 429 : 217 I. C. 373, Purushottam Devji v. Emperor.

2. ('44) 31 A. I. R. 1944 Bom. 292 : I.L.R. (1944) Bom. 576 : 218 I. C. 359 (F. B.), Hansraj Astaji v. Emperor.

Court is satisfied that the offence has been committed shall be forfeited to His Majesty, unless for reasons to be recorded in writing the Court is of opinion that the direction should not be made in respect of the whole, or as the case may be, a part of the foodgrains."

It is clear from this clause that in every case where the provisions of the Order have been contravened, an order of forfeiture must be made as a matter of course unless for special reasons the Court is of the opinion that such order should not be made. This amended provision was not in force when the two Bombay cases and the unreported case of this Court, Criminal Revn. No. 1613 of 1944, on which reliance is placed by Mr. Shamair Chand, were decided; but it had come into operation before the petitioner was convicted and there can, therefore, be no doubt that the order impugned was validly made. As in such cases forfeiture is the normal course and I see no special circumstances justifying a departure from that course, this petition for revision must be dismissed.

K.S./D.H.

Revision dismissed.

[Case No. 38.]

A. I. R. (33) 1946 Lahore 200

HARRIES C. J. AND DIN MOHAMMAD J.

*Haji Abdul Razak — Plaintiff —
Appellant*

v.

*S. Ali Bakhsh and another —
Defendants — Respondents.*

First Appeal No. 269 of 1941, Decided on 12th July 1944, from decree of Commercial Sub-Judge 1st Class, Delhi, D/- 28th June 1941.

(a) Muhammadan law—Wakf—Creation of—Use of word "wakf" if necessary — Wakf may be inferred from tenor of grant.

In order to constitute a valid *wakf* it is not necessary that the term *wakf* should be expressly used. Any implied expression is enough for the purpose. A *wakf* may be inferred from the general tenor of the grant: 2 M. I. A. 390 (P.C.) and ('22) 9 A. I. R. 1922 P. C. 123, *Rel. on.* [P 208 C 2]

(b) Muhammadan law—Wakf — Creation of, by will—Validity of.

A *wakf* created by will is as valid under Muhammadan law as a *wakf* created during the lifetime of the *wakif*: 15 Cal. 329 (P.C.), 25 All. 236 (P.C.) and ('37) 24 A. I. R. 1937 P. C. 174, *Rel. on.*

[P 208 C 2]

(c) Muhammadan law—Wakf—Wakif in his will providing that in case his heirs decided to partition property among themselves one-third should be separated and expended by his executor on works acceptable to God — One of heirs choosing to separate even in his lifetime — Held direction about one-third came into play and wakf was not contingent.

The testator by his will executed a *wakf-al-ul-aulad* under which his eldest son was to manage

his entire properties and part of the income thereof was to be spent on certain mosques erected by the *wakif* and the rest of the income distributed between the members of the *wakif*'s family including the *wakif*. The will further provided that if and when all the heirs decided to partition the property among themselves, the equivalent in cash of one-third of his property would be separated and expended by *H* who was described as the executor and was unconnected with the *wakif*'s family on works acceptable to God and the remaining two-thirds would be divided among the heirs according to the shares fixed in the will. One of the *wakif*'s heirs chose to separate his own share even in his lifetime. Thereupon, his direction that one-third of his property should be reserved for religious purposes at once came into play :

Held that the *wakf* of the whole property may have been invalidated on account of the provision for partition among heirs, but the *wakf* of one-third of the property was a perfectly valid *wakf* in the eye of the law and no charge of contingency could be levelled against it. [P 211 C 1]

(d) Muhammadan law—Wakf—Creation of—No express dedication — Wakf if may be declared by user or reputation.

Even if there be no express dedication, a property can be declared to be *wakf* by mere user or reputation: 40 Cal. 297 (P.C.), *Rel. on.* [P 209 C 1]

(e) Muhammadan law—Wakf—Creation of—No wakf in proper sense of term — Property if may be declared to be trust.

Even if there be no *wakf* in the proper sense of the term, a property may be declared to be trust property if it is found to be burdened with obligation for the purposes of a charitable or religious nature: 15 Cal. 329 (P.C.); ('19) 6 A. I. R. 1919 Mad. 515 and ('32) 19 A. I. R. 1932 Pat. 33, *Rel. on.* [P 209 C 1]

(f) Muhammadan law — Wakf — Property whether wakf — Actings or statements of grantee and method of treatment of property on administrative records—Relevancy of.

In considering whether certain property is *wakf* or not the actings or statements of the grantee or his successor may be relevantly taken into account as to his interpretation of the original grant; while the method in which the property has been treated on the administrative records may also throw light on the same problem. These things, though not conclusive, are circumstances worthy of consideration: ('24) 11 A. I. R. 1924 P. C. 109, *Rel. on.* [P 209 C 1]

(g) Will—Part of document may operate in *presenti* while rest in *futuro* as will.

There is no objection to one part of an instrument operating in *presenti* as a deed and another in *futuro* as a will: 22 All. 162, *Rel. on.*

[P 209 C 1]

(h) Muhammadan law — Wakf—Investment of wakf property — Property purchased out of proceeds of wakf becomes part of wakf.

Investment of *wakf* property is contemplated by Muhammadan law and property purchased out of the proceeds of the *wakf* becomes part of the *wakf* itself. [P 210 C 1]

(i) Muhammadan law—Wakf — Conditional wakf—Validity of.

It is not every conditional *wakf* that is invalid under the Muhammadan law. When the condition is capable of immediate ascertainment or operation the *wakf* is valid. [P 211 C 1]

(j) Muhammadan law — Wakf — Executor named in wakif's will to receive equivalent in cash of one-third of wakif's properties and to spend it on works acceptable to God at his discretion—Wakf held valid.

The *wakif* in his will directed that the executor named in the will should receive cash equivalent to one-third of his properties and should spend it at his discretion on works acceptable to God :

Held that the provision that the amount received by the executor should be spent at his discretion did not render the *wakf* invalid : 29 Bom. 375 and ('32) 19 A. I. R. 1932 Cal. 93, *Rel. on.* [P 211 C 1]

(k) Muhammadan law — Wakf — Wakf of cash — Validity of.

Even prior to the Mussalman Wakf Validating Act of 1913 which made it legal for any kind of property to be made *wakf*, the *wakf* of cash was valid under the Muhammadan law, for cash can be invested in business or commerce and the benefit derived therefrom can be used for religious purposes. [P 211 C 2]

(l) Muhammadan law — Wakf — Wakf of superstructures — Validity of.

The wakf of a building without the land on which it is situated is valid under the Muhammadan law. [P 212 C 1]

(m) Muhammadan law — Wakf — Wakf for religious purposes is valid — It is not vague or indefinite.

Under Muhammadan law, all works of religious charity or public utility can be proper objects of a *wakf*. Religious purposes are known to every Muslim, having been defined in the Quran and explained by the Prophet. This being so, it cannot at all be said that a *wakf* meant for religious purposes is in any way vague or indefinite, and hence invalid. [P 212 C 1]

(n) Muhammadan law—Wakf—Private and public wakf—Distinction—Wakf held public.

Under the Muhammadan law a private *wakf* is subject to the same restrictions as any public *wakf*, as Muhammadan law treats both private and public *wakfs* alike. Their incidents are practically the same in both cases; the property in both cases is inalienable and non-hereditary and both fall under the supervision of the *Kazi* in the same manner. [P 212 C 1]

A *wakf* created under a will whereby the executor was to receive cash equivalent to the value of one-third of the testator's property and was to apply the same to religious purposes at his discretion is a public and not a private wakf when no benefit of the *wakif*'s family was intended thereby. [P 212 C 1]

(o) Will — Executor — Want of probate — Effect of.

The position of the executor as such of a will (of a Muhammadan) is not affected in the least for want of a probate : ('22) 9 A. I. R. 1922 Bom. 392 and ('32) 19 A. I. R. 1932 P. C. 92, *Rel. on.* [P 212 C 1]

(p) Muhammadan law—Wakf—Wakf created by will — Executor appointed — Powers and position of—Executor becomes mutwalli.

If a person makes a *wakf* during his lifetime, but does not appoint a *mutwalli* thereof even when death comes upon him, but appoints an executor, such executor will be the executor as well as the *mutwalli* of the *wakf*. [P 212 C 2]

An executor charged with the duties of managing a *wakf* may function as such only so far and

so long as the estate is realized and no sooner this is done than the estate becomes the property of God and his status as an executor automatically comes to an end and he becomes *mutwalli* thereof.

[P 212 C 2]

An executor so appointed to manage the wakf can on his turn appoint an executor who takes the same place and exercises the same powers as the original executor. The executor is entitled to appoint a *mutwalli* because he is the *wakif's locum tenens.* : 31 Cal 89 and ('18) 5 A. I. R. 1918 Cal 41, *Approved.* [P 213 C 1]

(q) Muhammadan law—Wakf — Mutwalli—Power of, to nominate successors.

Where a *mutwalli* is empowered to spend the income of the *wakf* property at his own discretion, it can safely be concluded that his powers were general in the sense in which this term is used in Muhammadan law. A *mutwalli* so appointed is empowered under that law to nominate his successors at any time he likes. [P 213 C 1]

(r) Muhammadan law — Wakf — Mutwallis — Number of.

The number of persons who can be appointed as *mutwallis* is not restricted under the Muhammadan law. [P 213 C 2]

(s) Words and phrases—Arabic word "musiyan" — Meaning of.

The word '*musiyan*' is the plural of *musi* which in Arabic means "a person making a will." If a legatee is intended to be expressed, the word used is *musa-la-hu*. [P 213 C 1]

(t) Muhammadan law — Wakf—Mutwalli — Successor nominated by, empowered to manage wakf during mutwalli's life in certain contingencies is not executor.

A person who is nominated by the *mutwalli* of a *wakf* in his will as his successor and who is empowered to manage the *wakf* even during the *mutwalli's* life-time in certain contingencies can in no circumstances be described as an executor, who takes office only on the death of his appointer and not before. [P 213 C 1]

(u) Muhammadan law — Wakf — Mutwalli — Position of — Nature — He is not trustee but manager.

The duties of a *mutwalli* may be akin to those of a trustee; he may even loosely be called a trustee, but the legal incidents governing the two are not the same. The property under trust vests in a trustee but a *wakf* can never vest in a *mutwalli*. He can claim no right of ownership, or estate in the *wakf*, but is merely entrusted with the fulfilment of the objects of the *wakf*. His position, therefore, is no more than that of a superintendent or manager : ('22) 9 A. I. R. 1922 P. C. 123; ('34) 21 A. I. R. 1934 P. C. 77 and ('39) 26 A. I. R. 1939 P. C. 185, *Rel. on.* [P 213 C 2]

(v) Muhammadan law—Wakf — Mutwalli—Power of, to appoint successor by will.

If the mode of succession to the office of *mutwalli* is not defined in the deed of endowment itself, the *mutwalli* for the time being is empowered to appoint his own successor by will : ('19) 6 A. I. R. 1919 Cal. 644, *Rel. on.* [P 214 C 1]

(w) Muhammadan law—Wakf — Mutwalli—More mutwallis than one appointed — Each one can nominate his successor.

If more *mutwallis* than one are appointed, one cannot ordinarily act without the collaboration of

the other and considering that, in the absence of any direction to the contrary, a *mutwalli* is authorized to appoint a successor to himself, it is but reasonable that each one of the *mutwallis* should be competent to nominate his successor so as to take his place on the occasion of his death.

[P 214 C 2]

(x) Muhammadan law — Wakf—Mutwalli—Mutwalli can nominate successor by will even when in good health — Nomination need not be made on death bed.

A *mutwalli* is in no way debarred from nominating his successor by will even when he is in good health. When the texts of Muhammadan law lay down that a valid appointment of a successor can only be made on death-bed (*marz-ul-mout*) they deal with the actual transfer of the office at once and not with the nomination of a successor, who is to take office only after the death of the *mutwalli*. The texts cannot be interpreted to mean that even a nomination to be valid must be made on death-bed.

[P 216 C 1]

Moreover a document of a testamentary character speaks as from the moment of death and, therefore, the nomination of his successor by the *mutwalli* by will even when in good health is valid : ('41) 28 A.I.R. 1941 Lah. 36, *Not approved* ; *Case law discussed*.

[P 216 C 1]

(y) Muhammadan law—Wakf—Primary and subsidiary rules in law relating to wakfs—Interpretation and applicability of.

A British Indian Court which now functions in place of a *kazi* may not be in a position to interfere in any manner with the primary rules in the law relating to wakfs but the subsidiary rules cannot be as sacrosanct as the primary ones and the Court is entitled to interpret and apply them in a manner most consistent with justice and expediency.

[P 216 C 1]

(z) Mussalman Wakf Act (1923), Ss. 3 and 4 —Wakf not public within S. 92, Civil P. C.—Act applies.

The Mussalman Wakf Act will govern a *wakf* even if it is not public within the meaning of S. 92, Civil P. C. Any person, therefore, who is interested in the *wakf* is at liberty to take action under that Act and call upon the persons in charge to render accounts and to satisfy the Court that the income is being spent on proper objects : ('33) 20 A. I. R. 1933 Cal. 581 and ('29) 16 A.I.R. 1929 Oudh 225 (F. B.), *Rel. on*.

[P 216 C 1, 2]

(z1) Muhammadan law—Wakf — Mutwalli—Power of, to dispose wakf property—Acquirer of property with notice of wakf—Position of.

A *mutwalli* has no power to dispose of the *wakf* property in any shape or form and even if any person acquires property with notice of charity charged upon it, he is as much bound by it as the person from whom he acquires it.

[P 216 C 2]

Badri Das, Ram Kishore, Madan Lal and Daya Kishan Mahajan — for Appellant.

Malik Barkat Ali and S. Abdur Rashid; and *Mahmud Ali* — for Respondents 2; and 1, respectively.

Din Mohammad J.—This is a plaintiff's appeal from a judgment and decree of the Commercial Subordinate Judge, First Class, Delhi, partly decreeing and partly dismissing his suit. In order fully to appreciate the matter in controversy between the parties

it will be necessary to set out the history of the property in suit at some length. In the first half of the nineteenth century there lived a pious Muslim, Sheikh Muhammad Taqi by name, who had performed a pilgrimage to Mecca on account of which he was known by the usual appellation of Haji. He had amassed a vast fortune from commissariat contracts and had a wife, Mt. Bakhtawar, two sons, Mohammad Shafi and Mohammad Rafi, and a daughter, Mt. Azima Bibi. With the object of avoiding any future disputes that may arise among his descendants over the property left by him, he executed a document on 21st December 1855, which he and the scribe chose to call a will, but which was in fact more on the lines of a *wakf-al-aulad* or in other words, settlement in favour of one's descendants with a provision for charity, than a bequest. After making certain preliminary observations as to the impermanence of human life which are usually found in wills and stating the reasons which had induced him to execute that document, he provided that his son Mohammad Shafi would during his lifetime at once step into the management of the property and realise its income. Out of the income so realised, Mohammad Shafi would spend Rs. 100 per mensem on the mosques erected by him (Mohammad Taqi) at Allahabad, Cawnpore, Ambala and Lahore, and would pay Rs. 200 per mensem to him so long as he lived. Out of the balance, Mohammad Shafi would receive Rs. 200 per mensem as his own share as well as Rs. 100 in addition as his remuneration for the services rendered and would pay Rs. 200 per mensem to Mohammad Rafi, Rs. 50 per mensem to Mt. Azima Bibi and Rs. 50 per mensem to Mt. Bakhtawar. Mohammad Shafi was, however, not to possess any power to dispose of the movable or immovable property in any manner, and if he ever showed any inclination to do so, his second son, Mohammad Rafi would at once replace him on the same conditions. If his heirs, however, desired to have their shares of the property separated, the sons would receive Rs. 40,000 each, the daughter Rupees 20,000 and the wife Rs. 12,000 and they would each execute a deed of relinquishment in order to avoid any further claim. If Mohammad Shafi would hesitate in any manner to carry out these directions, Haji Sheikh Qutab-ud-Din would as an executor carry them out. If any loss accrued in the management of the property, the said Qutab-ud-Din would be empowered to reduce the

shares of the heirs proportionately. If and when all the heirs decided to partition the property among themselves, the equivalent in cash of one-third of his property would be separated and expended by the said Haji Qutab-ud-Din on works acceptable to God, (*Masarif indallah*), and the remaining two-thirds would be divided among the heirs according to the shares fixed by God. If the agent (Mohammad Shafi) raised any obstacles in the way of the said Haji Qutab-ud-Din, the said Haji would be authorised to recover the property by suit and spend in accordance with the testator's wishes and at his own discretion on any works pleasing to God.

This document was duly registered on 24th December 1855. It may be observed that there is nothing on the record to show that Haji Qutab-ud-Din was in any way connected with the family. Mohammad Rafi realised his share during the lifetime of Mohammad Taqi, who died on 18th October 1859. Presumably, Mohammad Shafi continued in possession of the property till he went to Mecca in 1860. On 2nd May 1864, however, he was arrested on a charge of waging or attempting to wage war against the sovereign punishable under S. 121, Penal Code, and was sentenced to transportation for life with forfeiture of all his property to Government. Sometime in 1867, Mohammad Rafi instituted a suit against the Secretary of State for India in Council as well as his own mother and sister claiming succession to the trusteeship constituted by the document of 1855 and possession of all the property left by Mohammad Taqi. This suit was ultimately decided by a Division Bench of the Punjab Chief Court on 2nd January 1869, and is reported in 6 P. R. 1869.¹ After discussing all the pros and cons of the matter, the learned Judges made the following order:

"There must be a decree for an account of the estate of Mohammad Taqi deceased in the hands of the Deputy Commissioner of Ambala and the estate is declared divisible into shares according to the Muhammadan law: *one-third under the will being subtracted for religious purposes*, Mt. Azime is declared entitled to seven-sixteenths, Mt. Bakhtawar to two-sixteenths and the Government to the remaining seven-sixteenths. Mohammad Shafi's claim must be dismissed and no costs of these proceedings should fall upon the women."

Encouraged by this decision, Haji Qutab-ud-Din brought a suit against the Secretary of State for India in Council sometime in 1871, which was finally decided by the Chief Court

of the Punjab on 6th January 1872. The description of the suit as given in the copy of the decree drawn up in the Chief Court (Ex. D-16) runs as follows:

"For an account of the estate of the late Mohammad Taqi in the hands of the Punjab Government and that one-third part thereof, as it existed on 2nd January 1869, with interest at 6 per cent. be made over to plaintiff."

This suit was decreed in the following terms:

"That the plaintiff is entitled to an account of the estate of the late Mohammad Taqi in the hands of the Government from 4th May 1864, up to the date of this decree and orders that the said account be taken in the Court of the Deputy Commissioner of Ambala, leave being hereby reserved to both parties to bring before this Court any question that may arise as to the principle which shall govern the allowance or disallowance of contested items in the said account and the Court declares that the plaintiff is entitled to receive one-third share of the estate of the late Mohammad Taqi in the hands of Government as it stood on 4th May 1864 together with interest thereon...."

In pursuance of this decree, an account of the estate so decreed was drawn up on 12th March 1874, by Mr. Roberts, Assistant Commissioner, (Ex. D. 17), by which the total sum due to Qutab-ud-Din was assessed at Rs. 1,16,903-7-3, out of which two sums were to be further deducted leaving a balance of Rs. 1,14,685-13-10. The receipt executed by Qutab-ud-Din on 16th May 1874, however, evidences recovery of Rs. 1,16,683-3-8 as per details mentioned therein (Ex. D-18), with an endorsement over his signature that Rs. 1800 out of costs of the decree in favour of the women had been left with him under orders of the Court and would be deposited by him on 30th July 1874. The sum so received by Qutab-ud-Din included among other property one-third share of the *sarai* at Anarkali, Lahore, valued at Rs. 3605. In July 1872, the Punjab Government sold the superstructure of the remaining two-thirds of the *sarai* also to Qutab-ud-Din who was described in the sale certificate (Ex. D-19) as executor of Mohammad Taqi. It may be necessary to remark that the word 'and' occurring between Qutab-ud-Din and Mohammad Taqi in the translation of this exhibit is wrong, the correct word being '*wasi*' (executor) as used in the original deed.

On 17th April 1874, Haji Qutab-ud-Din made a will in which after describing himself as *muntamim wa muntazim karkhana amur-i-maznahi Haji Mohammad Taqi Sahib marhum barue wasiat nama Haji Sahib mausuf mawarrikha yakim December 1855*. (Superintendent and manager of the religious institution inaugurated under

1. ('69) 6 P. R. 1869, Sheikh Mahomed Ruffee v. Secretary of State.

the will of the late Haji Mohammad Taqi dated 1st December 1855), demised all the immovable property attached to the said institution to his three sons Abdul Ghani, Mohammad Shafi and Abdul Razaq, describing them as his *musiyan* (which if intended for legatees is a wrong use of the word) and directing them *inter alia* to receive Rs. 20 in all as remuneration for the services rendered and spend the balance on religious purposes. It was provided that in case he died during their minority, their mother Mt. Mohammadi Jan, would manage the said institution on their behalf. As each of them attained to a competent age he would assume the management himself along with his mother. A list of the property covered by the will was attached and it included the *sarai* at Anarkali, Lahore, along with 25 shops, and in the details of the expenditure to be incurred it was mentioned that after deducting Rs. 20 as stated above, half of the income would be spent on the repairs and maintenance of old mosques and the remaining half on the maintenance of the poor and the indigent.

On 12th February 1878, Qutab-ud-Din in the capacity of Haji Mohammad Taqi's executor sold the superstructure of 25 shops to one Jog Dhayan "for meeting expenses for charitable purposes" as stated in the deed (Ex. D-20), and on 15th May 1878, he died. Soon after his death, Mohammad Shafi son of Mohammad Taqi, whose life sentence had been remitted by the Government in the meantime, instituted a suit against Mt. Mohammadi Jan widow of Haji Qutab-ud-Din both in her personal capacity and as guardian of her three minor sons claiming the "office of *mutwalli* of the *wakf* property." This dispute was referred to arbitration on 9th November 1878. On 20th January 1879, the arbitrators made an award in the course of which it was stated that the property under dispute was admitted as *wakf* by the parties, and that it was necessary to protect the *wakf* fully and to utilise its income for charitable purposes. They accordingly left some property in possession of the heirs of Haji Qutab-ud-Din and made over the rest including the *sarai* at Lahore to Mohammad Shafi son of Mohammad Taqi and in addition appointed him a joint *mutwalli* in respect of certain mortgage rights. It was further provided that the defendants should defray the necessary expenses in connection with four mosques at Delhi specified therein and the plaintiff be responsible for the two mosques at Lahore

and Ambala, respectively. It was finally emphasised that the parties would possess no right to transfer the property without valid necessity according to Muhammadan law and should make every effort to keep the corpus intact.

In March 1879, Mohammad Shafi died, and it is not known whether the award was acted upon or not. In 1880, a suit was instituted by the Deputy Commissioner of Delhi under S. 539, Civil P. C., 1877, now corresponding to S. 92, against Mt. Mohammadi Jan and 22 others who were all heirs of both Qutab-ud-Din and Mohammad Shafi son of Mohammad Taqi "to enforce the administration of certain trusts alleged to be created by the will of Mohammad Taqi deceased." This suit was ultimately dismissed by Plowden J., on 27th January 1882, on a preliminary ground that the trust in question did not come within the ambit of S. 539. It was, however, explained in the judgment that it was neither denied that the bequest created a trust nor was it disputed that the executor appointed in the will received the funds bequeathed as a trustee. This judgment is reported in 50 P. R. 1882.² It is not clear how Haji Qutab-ud-Din spent the entire sum of money received by him in 1874 but he did acquire some property which passed to his descendants as provided in his will and was managed by them, as is evident from their subsequent handling of the property, without any compunction of conscience on their part or any check or control on the part of the public or the authorities concerned. In 1902, Mohammad Shafi son of Haji-Qutab-ud-Din died and the management of the property devolved upon the two remaining sons Abdul Razaq and Abdul Ghani to the exclusion of Mohammad Shafi's heirs. On 22nd August 1905, the Secretary of State for India in Council sold the site under the *sarai* at Lahore to Abdul Ghani and Abdul Razaq, "executors, trustees and the sons of Haji Qutab-ud-Din," for a sum of Rs. 4775-9-6. In 1908, Khurshid-ul-Islam and Badr-ul-Islam sons of Mohammad Shafi and grandsons of Mohammad Taqi instituted a suit under S. 539, Civil P. C., against Abdul Ghani and Abdul Razaq, who both had become Hajis by that time presumably from the income of the trust property. This suit was dismissed by Mr. Ellis, District Judge, on 30th November 1912, and an appeal from his decision was dismissed by Mr. Agnew, 2. ('82) 50 P. R. 1882, Deputy Commissioner of Delhi v. Mt. Muhamdi Jan.

Divisional Judge, on 28th April 1914. The plaintiffs preferred a second appeal to the Punjab Chief Court, which, too, was dismissed by a Division Bench composed of Shadi-Lal and LeRossignol JJ. on 8th July 1918, on the principal ground that a bequest *Bamasrif indallah* did not exclude all idea of a private trust.

* In the meantime, on 15th September 1914, Abdul Ghani and Abdul Razaq describing themselves as *wasis* (executors) and sons of Haji Qutab-ud-Din entered into an agreement (Ex. D-4) for the management of the *sarai* at Lahore. It was stated therein that the executants were *wasis* (executors) and administrators of the property bequeathed by Mohammad Taqi deceased and as such they did not find it convenient to come together on each occasion and were consequently compelled to settle between themselves that in future the *sarai* would be divided into two portions for the purposes of the management: the southern portion to remain under the supervision of Abdul Razaq and the other portion to be managed by Abdul Ghani. Some of the Delhi property was also similarly partitioned. They, however, agreed that the entire income would be spent on charitable purposes and the account of the income and the expenditure would be regularly maintained by both the executors. On 2nd May 1924, Abdul Ghani made a will in favour of his son Jamil-ur-Rehman appointing him as his "executor, successor and representative" and authorising him to manage the bequeathed property as "executor, trustee, representative and successor" along with Haji Abdul Razaq his brother jointly or severally as he was doing then. It was, however, clearly stated that the sole object of appointing Jamil-ur-Rehman as his executor and representative was to ensure that the charitable institution which was being bequeathed to him should continue even after his death. He directed Jamil-ur-Rehman to "utilise the entire income from the aforesaid property for charitable purposes" and enjoined on the said executor to keep the property intact. He also empowered him to appoint one or more persons as his own executors and successors after him, if he so thought fit. The detail of the property attached to this will included the *sarai* at Lahore, five houses in Delhi and six *bighas* of land situate at Mauza Pipal Thalla in the province of Delhi. A note was added at the end that he had even previously executed a will in respect of "the above trust property" on 9th June 1923,

which was registered on 18th June 1923, but as the numbers of houses given there were wrong, he considered it necessary to cancel it and execute a new one. This will was registered in the office of the Sub-Registrar, Delhi, on 28th May 1924. It may be observed that the word 'besides' occurring before the words 'after my death' has been wrongly translated for the words "and authorise him that" appearing in the original.

On 27th June 1927, Abdul Ghani and Abdul Razaq entered into another agreement between themselves relating to the property held by them in their capacity of executors and administrators. This document was registered on 29th June 1927, in the office of the Sub-Registrar, Delhi. In cl. 1 of this agreement it was stated that they were holding the property detailed therein situate at Lahore and in the Delhi Province, under the will of Haji Mohammad Taqi deceased in their capacity as trustees. The property at Lahore was described as "the entire property known as *sarai* Mohammad Shafi, and one shop, facing the west, situate in Bazar Anarkali, Lahore," while the property situate in the Province of Delhi, included five houses and a piece of agricultural land. In cl. 2 it was reiterated that their capacity in relation to this property was that of trustees only. In cl. 2 again it was stated that they "were first managing and administering the aforesaid property pertaining to the trust jointly," and then managing it "individually and separately." In cl. 4 it was mentioned that they had decided to carry on the management separately with a view "to facilitating the conduct of the trust affairs." In cl. 5 the property in their possession was again described as trust property. Then followed in cls. 6 and 7 the details of the property which were to be separately managed by each of the executants. In cl. 8 the mosque inside the *sarai* was left under the joint management of both executants and in cl. 9 a provision was made for renovating the latrines of the *sarai*. In cl. 10 it was stated that neither of the executants would be competent to sell, mortgage, gift or exchange the whole or any part of the trust property of his own accord. On 10th April 1939, Abdul Ghani died and his son Jamil-ur-Rehman came into possession of this property on the strength of Abdul Ghani's will. On 24th October 1939, Jamil-ur-Rehman mortgaged the property situate both at Delhi and Lahore under his charge to Ali Bakhsh for Rs. 10,000. In the deed

executed for the purpose, he stated that his father Abdul Ghani

"as the owner as trustee of the property situate at Delhi, as well as of the property situate in Anarkali Bazar, Lahore, known as *sarai* Mohammad Shafi together with a shop,"

and that he was his executor, successor and representative ever since his death by virtue of his will executed on 2nd May 1924 and registered on 30th May 1924. The purpose for which this mortgage was executed was stated to be "to effect repairs and make construction in and improvements and additions to the property." On the same day, Jamil-ur-Rehman executed a registered deed of lease in favour of Ali Bakhsh in respect of the property mortgaged by him. On 19th April 1940, the suit out of which this appeal has arisen was instituted by Abdul Razaq against both Ali Bakhsh and Jamil-ur-Rehman. The plaint then presented was ultimately amended on 28th January 1941 and the reliefs claimed by the plaintiff were stated as follows:

"(a) That it be declared that the properties mentioned in Sch. A and referred to in the mortgage-deed and lease-deed, dated 24th October 1939, are *wakf* properties, and that defendant 2 (Jamil-ur-Rehman) was not competent to execute the said documents in favour of defendant 1 (Ali Bakhsh) or create a mortgage on the *wakf* properties. (b) That a permanent injunction be issued against defendant 1 not to enforce the said documents against the trust properties. (c) That the said documents be cancelled and an intimation be given to the Registrar to the said effect. (c-1) That a decree for possession of the properties set out at Nos. 3, 4 and 5 in Sch. A hereto annexed and briefly described below be passed. (d) That costs of the suit be granted. (e) That such other relief as the Court thinks fit be granted."

The schedule referred to above included the following items of property:

"(1) Share of *sarai* Mohammad Shafi, Lahore (Khasra No. 591/364). (2) One shop three-storeyed situate in Bazar Anarkali. (3) House No. 525 situate in Haveli Hassam-ud-Din Haider, Delhi. (4) House No. 542 situate in Haveli Hassam-ud-Din Haider, Delhi. (5) Houses and stables bearing Nos. 532, 534 and 535, situate in Haveli Hassam-ud-Din Haider, Delhi."

In the amended plaint it was pointed out that No. 525 of the house at No. 3 in the schedule was wrong and that its correct number was 575. It was alleged in the plaint that Sheikh Mohammad Taqi created a *wakf* of his property by his will dated 21st December 1855, and appointed Haji Qutab-ud-Din as his executor (*mutwalli*) of the *wakf* property and that Haji Qutab-ud-Din in his turn appointed his three sons as *mutwallis* of the *wakf* property by his will dated 17th April 1874. One of his sons Mohammad Shafi died in December 1902, and the property came under the manage-

ment of the surviving executors (*mutwallis*) Abdul Ghani and Abdul Razaq. On the death of Abdul Ghani, Abdul Razaq became the sole surviving trustee (*mutwalli*) entitled to the management of the *wakf* property. It was further stated that the will of Abdul Ghani, dated 2nd May 1924, conferred no rights on Jamil-ur-Rehman. Further, the will being in favour of an heir was invalid and inoperative. It was also averred that the property in suit could not be mortgaged by Jamil-ur-Rehman to Ali Bakhsh and consequently the said mortgage or charge was not binding on the plaintiff or on the *wakf* property in any manner. Jamil-ur-Rehman had no right to execute the lease in favour of Ali Bakhsh in respect of the *wakf* property and both the mortgage-deed and the lease, therefore, were liable to be cancelled on the grounds: (a) that the property covered by those deeds was *wakf*; (b) that no loan was necessary either for the payment of any debt due from the *wakf* property or for the improvement or construction or repairs of the said property; and (c) that Jamil-ur-Rehman was neither a trustee nor an owner of the property in suit and had consequently no authority to raise any loan on behalf of the trust or to execute any deed of mortgage or lease. It was also stressed that, at any rate, the *wakf* property could not be mortgaged or transferred without the consent of the plaintiff, that the consideration shown in the deed was fictitious and that the said documents were executed against the interests of the *wakf* and with the object of dissipating the *wakf* property and creating complications and causing harassment to the plaintiff. This plaint was drafted in English and the words shown in brackets appear there as reproduced.

Both Ali Bakhsh and Jamil-ur-Rehman resisted the suit on various grounds. On behalf of Ali Bakhsh, it was contended *inter alia* that the plaintiff could not be the sole surviving trustee, manager or *mutwalli*, that the document executed by Jamil-ur-Rehman was not a mortgage-deed but a deed of hypothecation, that the property was not *wakf*, that, at any rate, it was not a public *wakf* and that consequently Jamil-ur-Rehman could not be controlled by the plaintiff in any manner. Jamil-ur-Rehman, on the other hand, after giving the whole history of the property and the vicissitudes through which it had passed as stated above acknowledged the *wakf* nature of the property but insisted that he was a validly appointed manager of the property left by

his father Abdul Ghani, that his father had advanced a loan of Rs. 13,000 to the institution from his own pocket, that the amount so advanced was claimed by his father's heirs and being a debt due from the institution, he as manager was bound to pay it and that consequently he had a right to create a charge on the property and the plaintiff who had no interest in the property owned and possessed by Abdul Ghani and after him by Jamil-ur-Rehman for religious purposes had no right to control his action. With the object of supporting the mortgage executed by him he referred to a sale of a portion of the trust property effected by Haji Qutab-ud-Din during his lifetime and to an exchange made by the plaintiff himself. On the pleadings of the parties thus raised, the Subordinate Judge struck the following issues:

- (1) What is the nature of the property in suit?
- (2) Did Sheikh Mohammad Taqi create a *wakf* of his property and appoint Haji Qutab-ud-Din as *mutwalli* of the suit property by means of a will dated 21st December 1855?
- (3) Did Qutab-ud-Din purchase the property in dispute and validly set it apart for religious and charitable purposes?
- (4) Whether the plaintiff is the sole surviving trustee of the property in suit?
- (5) Whether the *wakf* came to an end on the conviction of Mohammad Shafi son of Mohammad Taqi?
- (6) Whether the nature of the property has ceased to be *wakf* on account of adverse possession by Haji Abdul Ghani and Abdul Razaq?
- (7) Was Haji Abdul Ghani in the capacity of a manager competent to nominate a successor in respect of the suit property in succession to himself?
- (8) If so, did he validly appoint Jamil-ur-Rehman as a successor?
- (9) If so, did Jamil-ur-Rehman defendant 2, validly and for consideration mortgage or hypothecate the property in suit to defendant 1?
- (10) Whether the plaintiff is estopped from claiming to be the sole surviving trustee of the property?
- (11) To what relief is the plaintiff entitled?

Some of the findings of the Subordinate Judge on these issues exhibit a confusion of thought and are not happily worded but they are all reproduced here as they are. On issue 1, he came to the conclusion that since Mohammad Taqi intended the property in dispute to be used for religious purposes, though unspecified, and the income from the property had always been applied for those purposes by Qutab-ud-Din, the property in dispute, which formed part of the trust created by Mohammad Taqi through Qutab-ud-Din, was partly private and partly public trust. It was public in the sense that the income of the property was to be used *bamassrif indallah* (purposes acceptable to God), but it was private because it had not been specifically dedicated to God and no *mutwalli* as such had been appointed to administer it. It was not wholly private because it had not been purchased with

private money or for private purposes and Qutab-ud-Din by Ex. D. 2 had definitely made the property in dispute a part of an institution for religious purposes. The decision on issue 2 also went in the plaintiff's favour on the ground that the trust was admitted and had been created from the property of Mohammad Taqi and so did the decision on issue 3. It was held in this connection that Qutab-ud-Din purchased the property in dispute, set it apart for religious and charitable purposes and left it to his sons not as his heirs but as his trustees and that this position had always been accepted even by the sons. On issue 4 he remarked that the position assigned to Abdul Ghani and his brother was that of joint trustees and not that of owners of separate property. It was, however, added that Qutab-ud-Din was not an executor or the legal representative of Mohammad Taqi in the legal sense of the term but was a mere donee of Mohammad Taqi's property which had been granted to him to be spent on religious purposes at his absolute discretion. It was further observed that the

"trust was actually founded or started by Haji Qutab-ud-Din himself, though it was created by Mohammad Taqi, whose property was utilised for this purpose."

As regards the plaintiff and Abdul Ghani, the Subordinate Judge remarked that they were neither executors nor *mutwallis* but were appointed trustees of the property in dispute and consequently S. 312, Succession Act, could not be invoked in the present case. They were both in fact beneficiaries under the will of Qutab-ud-Din and could not be his executors. He finally held that the plaintiff was a co-trustee with Abdul Ghani of the trust in dispute, and since Muhammadan law did not recognise survivorship in respect of trustees, the plaintiff could not be treated as the sole surviving trustee of the property in suit. Issue 5 was found against Jamil-ur-Rehman and issue 6 against Ali Bakhsh. Issue 7 was decided in favour of Jamil-ur-Rehman and it was held that his nomination as a successor to Abdul Ghani was in order. On issue 8, the Subordinate Judge did not believe in the alleged re-affirmation of Jamil-ur-Rehman's appointment on Abdul Ghani's death-bed but he held that this appointment could not be questioned on that account inasmuch as the appointment was not that of a *mutwalli* by a *mutwalli* in office. He further remarked that the trust not being wholly public there was no rule of survivor-

ship applicable to it and consequently the appointment of Jamil-ur-Rehman could not be attacked on any ground under the Muhammadan law. On issue 9 it was found that Jamil-ur-Rehman could not alienate the property in dispute without the consent or agreement of the plaintiff, that there was no necessity to raise the loan but that full consideration had passed. Issue 10 was found against the defendants and under issue 11 a decree was made in favour of the plaintiff against the defendants for a declaration that the alienation effected by Jamil-ur-Rehman in favour of Ali Bakhsh was invalid and consequently defendant 1 was enjoined not to enforce the documents obtained by him against the trust property and an intimation was directed to be sent to the Sub-Registrar that the documents had been cancelled. The rest of the plaintiff's claim was dismissed on the ground that he was not entitled to the possession of the houses situate in the Province of Delhi. In the circumstances of the case the parties were left to bear their own costs of the suit.

From this decision the plaintiff has preferred an appeal praying that his suit for a declaration in respect of the Lahore property and for possession in respect of the properties situate in the Province of Delhi be decreed as lodged with full costs. He has urged that the rule of survivorship was applicable both to co-executors and co-trustees, that Haji Qutab-ud-Din had appointed his sons as co-executors only, that at any rate they were merely joint *mutwallis* and that the trial Judge was consequently wrong in holding that the rule of survivorship as laid down in S. 312, Succession Act, did not come into play. The appointment of Jamil-ur-Rehman by his father Haji Abdul Ghani as his successor, therefore, was altogether illegal. The respondent Ali Bakhsh, on the other hand, has submitted cross-objections by which he has protested against the decision of the Subordinate Judge declaring the mortgage and the lease in his favour to be null and void and pleaded that the mortgage was an act of good management and for necessity and that Jamil-ur-Rehman had full authority to execute it. In the course of arguments, however, his counsel, abandoning all these grounds, has attacked the judgment of the trial Judge only on the ground that the property in dispute could not in any way be treated as either *wakf* or trust property in the general sense of the term. Counsel for Jamil-ur-Rehman, on the other hand, has admitted that the property is *wakf* and

resisted the appeal on the simple ground that Jamil-ur-Rehman's appointment as *mutwalli* by his father Abdul Ghani was quite in consonance with Muhammadan law and not open to attack in any manner. In this state of affairs, our first task is to determine the true nature of the property in dispute. Before discussing this matter, it is necessary, however, to clear the ground by enunciating certain well-established rules of Muhammadan law relating to *wakfs*. In the first place, all Muhammadan jurists, old and new, are agreed that in order to constitute a valid *wakf* it is not necessary that the term *wakf* should be expressly used. Any implied expression is enough for the purpose. In Ameer Ali's Muhammadan Law, Vol. 1, page 217, it is stated :

"There is no essential formality or the use of any express phrase or term requisite for the constitution of a *wakf*. Where a dedication is intended, the law will give effect to it, in whatever language it may be expressed or in whatever terms the wish may be formulated."

It is further added at page 220 that "if the *wakif* be dead, his intention is to be gathered from the surrounding circumstances, and the evidence of the manner in which the proceeds of the property have been applied."

In 2 M. I. A. 390,³ a *wakf* was inferred from the general tenor of the grant. This principle was re-affirmed by their Lordships of the Privy Council in 44 Mad. 831,⁴ where it was observed at page 840 :

"When once it is declared that a particular property is *wakf*, or any such expression is used as implies *wakf*, or the tenor of the document shows, as in 2 M. I. A. 390,³ that a dedication to pious or charitable purpose is meant, the right of the *wakif* is extinguished and the ownership is transferred to the almighty. The donor may name any meritorious object as the recipient of the benefit."

Secondly, a *wakf* created by will is as valid under Muhammadan law as a *wakf* created during the lifetime of the *wakif*. If any authority is needed for this proposition, reference may be made to 15 Cal. 329⁵ and 30 I. A. 94.⁶ In A. I. R. 1937 P. C. 174,⁷ Sir George Rankin, who delivered the judgment of their Lordships, while commenting upon the distinction between *wakf bil wasivat* and *wasivat bil wakf* observed :

3. (1837-41) 2 M. I. A. 390 (P. C.), *Jewun Doss Sahoo v. Shah Kabeer-ood-Deen*.

4. (22) 9 A. I. R. 1922 P. C. 123 : 44 Mad. 831 : 48 I. A. 302 : 65 I. C. 161 (P. C.), *Vidya Varuthi Thirtha Swamigal v. Baluswami Ayyar*.

5. (88) 15 Cal. 329 : 15 I. A. 1 (P. C.), *Bishen Chand v. Nadir Hossain*.

6. (03) 25 All. 236 : 30 I. A. 94 (P. C.), *Baker Ali Khan v. Anjuman Ara Begam*.

7. (37) 24 A. I. R. 1937 P. C. 174 : 31 S. L. R. 379 : 168 I. C. 418 (P. C.), *Mahabir Prasad v. Mustafa Husain*.

"This distinction much discussed in 14 All. 429⁸ and 30 I. A. 94,⁶ lost much of its importance by the decision of this Board in the latter case. The distinction is one of form and not of substance as Sir Arthur Wilson therein explained. It is between a will which conveys the property on the death of the testator to the *mutwalli* as *wakf* or at least impresses the property with the character of *wakf* immediately on the testator's death, and a will which makes a gift of property with a direction to the donee to create the *wakf* desired, or to give a direction to the heir, executor or other representative to that effect."

Thirdly, even if there be no express dedication, a property can be declared to be *wakf* by mere user or reputation. Reference in this connection may be made to 40 Cal. 297.⁹ Fourthly, even if there be no *wakf* in the proper sense of the term, a property may be declared to be trust property if it is found to be burdened with obligation for the purposes of a charitable or religious nature. This principle can easily be deduced from 15 Cal. 329,⁵ as well as 42 Mad. 161¹⁰ and has been explained at some length by Khwaja Muhammad Noor J. in A. I. R. 1932 Pat. 33¹¹ at p. 48. Fifthly, in all such cases, as observed by their Lordships of the Privy Council in 51 I. A. 192¹² at p. 195,

"the actings or statements of the grantee or his successor may be relevantly taken into account as to their interpretation of the original grant; while the method in which the property has been treated on the administrative records may also throw light on the same problem. These things, though not conclusive are circumstances worthy of consideration."

It may also be added here that under the general law of the land there is no objection to one part of an instrument operating *in presenti* as a deed and another *in futuro* as a will: 22 ALL. 162.¹³ Adverting now to the case before us, the two important documents that can throw any light on the point at issue are the will of Haji Mohammad Taqi and the will of Haji Qutab-ud-Din. It will, however, be necessary to interpret these documents against this background that in 1855 when the first will was executed people in this country and especially those

living in the town of Delhi, where the Mughal Emperor still reigned, though in name, were utter strangers to the principles of English law that were subsequently imported in this country and the Muslims were especially biased towards their own *shariat* and even at the time of the execution of the second will in 1874 the law as it now prevails was still in its infancy and people had neither imbibed its notions fully nor acquainted themselves with its technicalities. The will of Mohammad Taqi was drafted in Persian which happened to be the court language in those days. By this document as explained above he appointed his eldest son as the manager of his property even during his own lifetime and the terms that he used to describe his son's status were *wasi*, *munsarem*, *mukhtar-i-kar*, which respectively mean 'executor' 'administrator' and 'attorney' and although he used the words "*wasyat me kunam*" which would ordinarily mean "I bequeath," yet laid down directions which were in the nature of *wakf-al-ul-aulad* and had to take effect immediately during his lifetime. He divested himself entirely of ownership in the property *in presenti* and after reserving Rs. 100 per mensem for charity accepted an allowance of Rs. 200 for himself and granted a similar allowance to each of his two sons. *Wasyat* according to the Persian English Dictionary by F. Steingass may mean "a mere mandate, command or charge" and *wasyat me kunam* may convey the idea of "I charge." Interpreted in this light, the document may not have been a will at all in the real sense of the term but it is apparent that Mohammad Taqi did use these words in the sense of will alone. He further provided in this document that if his attorney Mohammad Shafi was ever disposed towards alienating any part of this property, his second son Mohammad Rafi would oust him forthwith. At the same time, it was stated that if his heirs were at any time inclined to separate their shares, they would be paid according to the directions made by him. It was at this stage that Haji Qutab-ud-Din was introduced. He was described as *wasi*, i. e., executor, and besides being charged with settling the disputes that may arise among his heirs, he was empowered to receive a sum equivalent to one-third of the value of his whole property which was to be set apart for religious purposes and to be spent at his discretion in accordance with the directions in the will. It was in pursuance of these directions that when in 1869 the Punjab

8. ('92) 14 All. 429 (F. B.), Agha Ali Khan v. Altaf Hasan Khan.

9. ('13) 40 Cal. 297 : 40 I. A. 18 : 27 P. R. 1913 : 17 I. C. 744 (P. C.), Court of Wards v. Ilahi Bakhsh.

10. ('19) 6 A. I. R. 1919 Mad. 515 : 42 Mad. 161 : 49 I. C. 821, Md. Esuf Sahib v. Abdul Sathur Sahib.

11. ('32) 19 A. I. R. 1932 Pat. 33 : 11 Pat. 288 : 136 I. C. 417, Mahomed Kazim v. Abi Saghir.

12. ('24) 11 A. I. R. 1924 P. C. 109 : 51 I. A. 192 : 51 Cal. 446 : 21 N. L. R. 1 : 80 I. C. 645 (P. C.), Mahomed Raza v. Yadgar Hussain.

13. (1900) 22 All. 162, Chand Mal v. Lachmi Narain.

Chief Court decided the suit brought by Mohammad Rafi, one-third share of Mohammad Taqi's property was sliced off for religious purposes. Later, Haji Qutab-ud-Din succeeded in recovering this share merely on the strength of Mohammad Taqi's will.

There can be no question but that whatever was received by Qutab-ud-Din had already been ear-marked by the owner for religious purposes and this, as already stated, included one-third share of the *sarai* at Lahore. Consequently, the *sarai* was *wakf* to all intents and purposes. Haji Qutab-ud-Din later made certain acquisitions himself from the moneys received by him but it is well known that investment of *wakf* property is contemplated by Muhammadan law and property purchased out of the proceeds of the *wakf* become part of the *wakf* itself. (Ameer Ali's Muhammadan Law, Vol. I, page 472). It was on this account that in the will executed by Haji Qutab-ud-Din it was emphasized that the nature of the entire property dealt with by him was *wakf*, and the only position that he chose for himself while executing that document was that of a manager or administrator of the religious institutions inaugurated by Mohammad Taqi under his will. He further stressed that the income derived from the properties covered by the will should be spent for religious purposes only and that the capital should not be squandered or consumed at all. A similar position was assigned to his three sons whom he named in the will and they were directed to abide by his wishes and to spend the income for purposes specified in his will. Even up to 1874, therefore, the property in dispute did not lose its religious character. Five years afterwards, when a dispute arose between Mohammad Shafi, son of Mohammad Taqi, on the one hand and the legal representatives of Qutab-ud-Din, who had died in the meantime, on the other, the arbitrators appointed to settle the dispute again laid particular emphasis on the property in dispute between the parties to be *wakf* and they enjoined on the parties to spend the income derived therefrom on certain mosques situate at Dehli, Ambala and Lahore. Even in the documents which came into existence later in 1914 and 1927 respectively in the shape of agreements between the present plaintiff and his brother Abdul Ghani, father of Jamil-ur-Rehman defendant, the property in dispute was throughout described as *wakf* and as I read the mortgage-deed executed by Jamil-ur-Rehman in favour of Ali Baksh, the same

character appears to have been attributed to the property mortgaged in so far as the mortgagor described himself as a trustee of the said property. In view, therefore, of the documents referred to above as well as of all the statements made by the parties and their predecessors-in-interest off and on and in the light of their own conduct in relation to this property it cannot but be held that the property in dispute is *wakf*. The mortgagee, therefore, who stands in the shoes of Jamil-ur-Rehman and is bound by the statements made in his own deed cannot reasonably urge that the property in dispute is not *wakf* but secular property owned as such by his mortgagor and before him by his predecessors-in-interest.

But even if on any technicality of law it were not possible to hold that it is *wakf*, it cannot at all be disputed that it is in the nature of trust property impressed with the obligation of its income being spent on religious purposes, and this again will evidently make it subject to the same incidents as *wakf* property, and not advance the cause of the mortgagee in any manner. It is, however, contended on behalf of the mortgagee that Mohammad Taqi never himself created any valid *wakf* inasmuch as first, the so-called *wakf* was contingent, and secondly, it was left entirely to Qutab-ud-Din's discretion to spend the money received by him in any way he thought fit. It is also argued that no tying up of any property was contemplated by Mohammad Taqi nor did he divest himself of his right of ownership therein. It is further stressed that no valid *wakf* could be created of cash nor of the *sarai* as it was only the superstructures that were owned by Mohammad Taqi at the time of the execution of his will and not the site thereof. It is finally argued that the objects of the *wakf* had not been expressly defined and that at any rate it was no more than a private demise of the property on Haji Qutab-ud-Din. I, however, consider that none of these contentions carries any weight.

Taking the objection on the ground of contingency first, it is clear that the directions made by Mohammad Taqi so far as they relate to one-third of his property do not suffer from any such defect as would invalidate the *wakf*. Muhammadan law no doubt does not allow contingent *wakfs* but the *wakf* created by Mohammad Taqi was not of this description at all. The first thing that he did was to create a *wakf-al-ul-aulad* in the only form recognised by Muham-

madan law. Although such *wakfs* were prior to 1913, in spite of the dicta of some eminent Muslim Judges to the contrary, treated as invalid, yet the fact remains that they were valid under the unadulterated Muhammadan law and were ultimately declared to be such by the Mussalman Wakf Validating Act of 1913. Later on, by Act 32 [XXXII] of 1930, which also is known as the Mussalman Wakf Validating Act, the original Act of 1913 was made applicable to all *wakfs* created before its commencement. This scheme, however, did not materialize and one of Mohammad Taqi's heirs chose to separate his own share even in his lifetime. Thereupon, his direction that one-third of his property should be reserved for religious purposes at once came into play. Was any contingency involved in this matter so as to invalidate the *wakf*? Decidedly not. The *wakf* of the whole property may have been invalidated on account of the provision for partition among heirs, but the *wakf* of one-third of the property was a perfectly valid *wakf* in the eye of the law. It was presumably on this ground that it was declared to be a valid *wakf* by the Punjab Chief Court first in 1869 when one-third of Mohammad Taqi's property was subtracted for religious purposes and again in the suit instituted by Haji Qutab-ud-Din in 1871, when as '*wasi*' of Mohammad Taqi he was paid this amount. Haji Qutab-ud-Din, who should be presumed to have understood the intentions of the *wakif* correctly treated the property received by him from the Deputy Commissioner, Ambala, partly in cash and partly in the shape of immovable property as *wakf* and when he invested a part of the cash himself in buildings and lands, he again considered them to be a part of the religious institution set up by Mohammad Taqi. In such circumstances, no charge of contingency can be levelled against this *wakf*. Even otherwise, it is not every conditional *wakf* that is invalid. As stated by Ameer Ali in his Muhammadan Law, Vol. I, p. 244, when the condition is capable of immediate ascertainment or operation, the *wakf* is valid :

"A man loses his property and says if I find it, by God I will make a *wakf* of my land, and he finds the property, it is incumbent on him to make a *wakf* of his land for the benefit of those to whom it is lawful for him to pay *zakat* or poor rates."

Similarly, the statement in the will of Mohammad Taqi that the amount received by Haji Qutab-ud-Din would be spent at his discretion also does not render the *wakf*

invalid. In 29 Bom. 375,¹⁴ a deed of indenture contained, among other things, a provision which ran :

"upon trust and for the use of the said trustees absolutely to be expended and used by them for such charitable purposes as they might think fit."

On a construction of this provision it was held by a Bench of the Bombay High Court composed of Sir Lawrence Jenkins C. J., and Batty J. that the words used created a valid trust for charitable purposes in the events which had happened. A similar proposition can be deduced from the judgment of Mukerji J. in 59 Cal. 402.¹⁵ So far as the tying up of the property is concerned, it has already been explained that on the wording of the will Mohammad Taqi clearly earmarked it for purposes acceptable to God and divested himself entirely of his right of ownership in that part of the property which was so reserved. It cannot be argued, therefore, that there was no tying up of the property or no divesting of the right of ownership in the sense in which Muhammadan law contemplates it. The contention that no valid *wakf* could be created of cash or that the superstructures of the *sarai* could not be the subject of *wakf* is equally devoid of force. Even prior to the Act of 1913, which made it legal for any kind of property to be made *wakf*, the *wakf* of cash was favoured by Muhammadan law. It is not necessary to burden this judgment with any full discussion on the subject. Reference in this connection may be made to Chap. 9, S. 1 of Ameer Ali's Muhammadan Law, Vol. I, where it is explained that despite the views of some of the jurists to the contrary, the majority of the eminent jurists have held that such a *wakf* is valid, for cash can be invested in business or commerce and the benefit derived therefrom can be used for religious purposes. In the present case, part of the cash received was invested in buildings and lands and the usufruct thereof was spent on religious purposes. This *wakf* of cash consequently cannot be assailed on any valid ground.

As regards the *wakf* of superstructures, reference may be made to pages 264 to 266 of Ameer Ali's Muhammadan Law, Vol. I. In S. 3 at p. 264, it is stated :

"The rule relating to the dedication of a building without the land on which it is situated is thus given in the Durr-ul-Mukhtar : 'a person builds a

14. (05) 29 Bom. 375, Advocate-General of Bombay v. Hormusji Noshirwanji.

15. (32) 19 A. I. R. 1932 Cal. 93 : 59 Cal. 402 : 133 I. C. 657, Masuda Khatun Bibi v. Mahomed Ibrahim.

house on some land and dedicates it with intention without the land. In that case the *wakf* is not correct according to some whilst others have held that it is correct and on this is the *fatwa*."

After discussing this matter at some length, at p. 266 it is stated,

"the doctrine now in force is, that the *wakf* of a building without the land on which it is situated is valid and the *fatwa* is accordingly."

This evidently means that the weight of authority is in favour of its validity and we cannot ignore this dictum. The charge of indefiniteness, too, is equally unsustainable. Under Muhammadan law, all works of religious charity or public utility can be proper objects of a *wakf* and *wakfs* for good objects have been given effect to by the Courts in this country. This is clear even from the dicta of their Lordships of the Privy Council in 44 Mad. 831.⁴ In the present case it was stated in the *wakif's* will that the moneys received by Haji Qutab-ud-Din would be spent on religious purposes at his discretion, and such purposes are known to every Muslim, having been defined in the Quran and explained by the Prophet. This being so, it cannot at all be reasonably argued that a *wakf* meant for religious purposes is in any way vague or indefinite, and hence invalid. The final objection that it was at best a private demise on Qutab-ud-Din need not detain us long. Even he himself did not take it in this light and that should clinch the matter on this score. It was finally suggested in the course of arguments that it was at best a private *wakf* but in the first place, the *wakf* of one-third of the property could not be treated as such as no benefit for the *wakif's* family was intended thereby, and secondly, even if it was private, it was subject to the same restrictions as any public *wakf*, as Muhammadan law treats both private and public *wakfs* alike. Their incidents are practically the same in both cases, the property in both cases is inalienable and non-heritable and both fall under the supervision of the *Kazi* in the same manner. On the grounds stated above, I would hold that the property in dispute was not secular in any circumstances of the case, but was *wakf* to all intents and purposes.

It now falls to be judged what status could Haji Qutab-ud-Din or his descendants claim in relation to the property in question. Were they executors, trustees or *mutwallis*? Taking Haji Qutab-ud-Din first, it is obvious that he was appointed by Muhammad Taqi himself as a *wasi*, i. e., executor. His position as such was not affected in the least

for want of a probate: 47 Bom. 231;¹⁶ 55 Mad. 443.¹⁷ It is not necessary, however, that an executor should remain an executor throughout his life. A person may discharge the functions of an executor for some time, but his position may change afterwards if he continues to remain in touch with the estate even after the terms of the will are carried out. In the present case, Qutab-ud-Din was an executor for the purposes of collecting the property which had been reserved for religious purposes, but as soon as the property was collected, he was at once clothed with the responsibilities and obligations of a *mutwalli*. This state of affairs is clearly contemplated under Muhammadan law. Ameer Ali in his Muhammadan Law, Vol. I, p. 449, remarks:

"If a person makes a *wakf* during his lifetime, but does not appoint a *mutwalli* thereof even when death comes upon him, but appoints an executor, such executor will be the executor as well as the *mutwalli* of the *wakf*. This is according to Abu Yusuf and the *Fatwa* is according to him."

This principle holds good even under the ordinary law of the land. In 31 Cal. 89,¹⁸ which was followed in 48 I. C. 295,¹⁹ it was pointed out that

"the duties of the executor are to administer the estate of the deceased only so far and so long as to enable him to carry out the terms of the will of which he is the executor. After the property has ceased to be the estate of the deceased and has become the property of the residuary legatee under the will, the executor as such has no authority to manage the estate on his behalf."

Referring to the facts of that particular case, the learned Judges observed:

"What was intended appears to us to be that she should as executrix administer the estate and see that the terms of the will were carried out, and, this being done, that she should manage the property covered by the will not as executrix under the will and administratrix of the deceased's estate, but as manager for the minor till he attained majority."

On the same analogy, an executor charged with the duties of managing a *wakf* may function as such only so far and so long as the estate is realized and no sooner this is done than the estate becomes the property of God and his status as an executor automatically comes to an end. Under Muhammadan law, even if *mutwallis* are appointed dur-

16. ('22) 9 A.I.R. 1922 Bom. 392 : 47 Bom. 231 : 70 I. C. 268, Mahomed Yusuf v. Hargovandas Jiwan.

17. ('32) 19 A.I.R. 1932 P. C. 92 : 55 Mad. 443 : 59 I. A. 112 : 136 I. C. 111 (P. C.), Venkata Subamma v. K. Ramayya.

18. ('04) 31 Cal. 89, Taran Singh Hazari v. Ram-ratan Tewari.

19. ('18) 5 A. I. R. 1918 Cal. 41 : 48 I. C. 295, Sankar Nath Mukherji v. Biddulata Debi.

ing the lifetime of the *wakif* but an executor is also appointed at the time of his death, the executor becomes a *mutwalli* along with the *mutwallis* already appointed (Ameer Ali, Vol. I, p. 450). It is further clear that under Muhammadan law an executor so appointed can on his turn appoint an executor who takes the same place and exercises the same powers as the original executor. An executor is entitled to appoint a *mutwalli* "because he is the *wakif's locum tenens*" (Ameer Ali's Muhammadan Law, Vol. I, pp. 448 & 450.) In my view, therefore, though Haji Qutab-ud-Din started as an executor in the first instance, yet as soon as he came into possession of the property separated for religious purposes, he became a *mutwalli* at once and thenceforward he was subject to all such obligations and entitled to all such privileges as a *mutwalli* could claim under the provisions of the Muhammadan law. In so far as Qutab-ud-Din was empowered to spend the income of the *wakf* property at his own discretion, it can safely be concluded that his powers were general in the sense in which this term is used in Muhammadan law. A *mutwalli* so appointed is empowered under that law to nominate his successors at any time he likes (Ameer Ali, Vol. 1, pp. 454, 455, 456). The number of persons who could be appointed as *mutwallis* is also not restricted. In Wilson's Anglo-Mahomedan Law (Edn. 6) it is stated in para. 327 :

"An endowment involves the vesting of the legal ownership or quasi-ownership of the property in one or more trustees (*mutwallis*) who are ordinarily nominated by the founder."

In Tyabji's Muhammadan Law, Edn. 3, it is remarked at p. 614 that "a body of persons constituting a committee may be entrusted with the administration of the *wakf*." This being so, the appointment of the three sons of Haji Qutab-ud-Din as his successors was not in any way repugnant to Muhammadan law and considering the nature of their appointment as envisaged in Qutab-ud-Din's will and the duties entrusted to, and the limitations imposed upon them, it cannot but be concluded that they, too, were mere *mutwallis* for all intents and purposes. They could even step into the management of the property during the lifetime of Qutab-ud-Din in certain contingencies and a person who is so empowered can, in no circumstances, be described as an executor, who takes office only on the death of his appointer and not before. The word *musiyan* which was used in relation to them, as has been already

pointed out, meant nothing in the context in which it was used. '*Musiyan*' is the plural of *musi* which in Arabic means "a person making a will." If a legatee is intended to be expressed, the word used is *musa-la-hu*. The intention of Qutab-ud-Din, therefore, was to appoint them as *mutwallis* and it was on this account that it was provided in the will that they could draw a remuneration of Rs. 20 per mensem for the services rendered by them to the religious institutions concerned. The appointment of their mother as their guardian until they attained majority also points to the same conclusion and so does the restriction placed on their power of disposition in regard to the property put in their charge. The two sons of Qutab-ud-Din, namely, the plaintiff and Abdul Ghani, when partitioning the management of the property between themselves in 1914 chose the designation of 'administrators', which can legitimately be translated as *mutwallis* and it was apparently with a view to avert all suspicions from them that they further made it clear in the deed that the income to be derived from the property mentioned therein would be spent on charitable purposes only. It is true that in the document subsequently executed in 1927 they claimed in cl. (1) to be "in proprietary possession" of the property situate at Lahore and in the Province of Delhi but in the same breath they referred to the will of Haji Muhammad Taqi and accepted the position of trustees in relation thereto. Even Abdul Ghani when he executed his own will in 1924 used the word "trustee" in relation to himself and conferred the same status upon his son Jamil-ur-Rehman as his executor, successor and representative. It must also be remembered that the appellant himself in his plaint repeatedly called himself, his co-workers and his predecessor mere *mutwallis*, and wherever he used the word executor, he took pains to translate it as *mutwalli*.

The duties of a *mutwalli* may be akin to those of a trustee; he may even loosely be called a trustee, but the legal incidents governing the two are not the same. The property under trust vests in a trustee but a *wakf* can never vest in a *mutwalli*. He can claim no right of ownership, or estate in the *wakf*, but is merely entrusted with the fulfilment of the objects of the *wakf*. His position, therefore, is no more than that of a superintendent or manager. This was made clear by their Lordships of the Privy Council in 44 Mad. 831⁴ and further restated

in 61 I. A. 50²⁰ and A.I.R. 1939 P. C. 185²¹ at p. 189, and need not be expatiated upon any further. I would, therefore, hold that Haji Qutab-ud-Din in the first instance and his descendants after him were no better than *mutwallis* in the strict sense of the term. It only remains to consider whether the appointment of Jamil-ur-Rehman as a successor to his father Abdul Ghani could be challenged on any ground. It cannot be disputed that if the mode of succession to the office of *mutwalli* is not defined in the deed of endowment itself, the *mutwalli* for the time being is empowered to appoint his own successor by will. Reference in this connexion may be made to Wilson's Anglo-Mahomedan Law, S. 329. A somewhat similar principle can be deduced from A. I. R. 1919 Cal. 644²² also. The appellant, however, levels his attacks against this appointment on two grounds: (1) that among *mutwallis*, as among executors, it is the rule of survivorship that prevails and this being so, on the death of Abdul Ghani, the appellant became the sole surviving *mutwalli* and any appointment of a successor made by Abdul Ghani was altogether invalid and *ultra vires*; (2) that in any circumstances, an appointment of a successor by the *mutwalli* for the time being is permissible only on death-bed, and inasmuch as Abdul Ghani appointed Jamil-ur-Rehman as his successor about 15 years prior to his death, when he was in full enjoyment of health, the appointment was altogether ineffective.

Jamil-ur-Rehman controverts both the propositions advanced by the appellant and, as I look at the matter, he is on firm ground. It is true that S. 312, Succession Act, enacts that upon the death of one or more of several executors or administrators, in the absence of any direction to the contrary in the will or grant of letters of administration, all the powers of the office become vested in the survivors or survivor. It may also be that Chap. VI of Part IX of the Act where this section occurs applies to Muhammadans in so far as they are not expressly exempted from the application of these provisions. But the question still remains whether this technical rule of Indian law which comes into play only in the case

of executors should govern the matter of *mutwallis* as well. The branch of Muhammadan law dealing with *wakfs* cannot be easily fitted into English legal conceptions as is observed by Wilson in his Anglo-Mohammedan Law at page 477 and pure Muhammadan law from which we have to evolve our guiding principles in this connection does not appear to favour this view. On the other hand, from several texts cited to us from Durr-ul-Mukhtar and Fatawa Alamgiri, it is possible to deduce that if more *mutwallis* than one are appointed, one cannot ordinarily act without the collaboration of the other and considering that in the absence of any direction to the contrary, a *mutwalli* is authorised to appoint a successor to himself, it is but reasonable that each one of the *mutwallis* should be competent to nominate his successor so as to take his place on the occasion of his death. To hold otherwise would amount to a direct interference with the intentions of the *wakif*. If he chooses to vest the management of his *wakf* in more hands than one, why should his wishes be thwarted by introducing a technical rule from a different system of law? Anyhow no clear authority has been produced before us either from any standard works on Muhammadan law or from the British Indian Law Reports which may lend any kind of support to the contention raised by the appellant, and this being so, it must be repelled. The question as to when can an appointment of a successor be validly made by a *mutwalli* is not free from difficulty. In almost all the texts it is generally stated that such appointments are valid only if made on death-bed. In Ameer Ali's Muhammadan Law, Vol. I, the following passage occurs at page 454:

"The *mutwalli* cannot, however, assign or transfer the office to any one, or appoint another during his lifetime, unless his own powers are 'general.' Should he in his lifetime and in health appoint another in his place the appointment will not be lawful and valid, unless the *mutwalli* has obtained the *towliat* with that condition, 'in a general manner'."

In Tyabji's Muhammadan Law, Edn. 3, S. 492F reads as follows:

"The *mutwalli* may, in accordance with S. 492A, appoint a successor to succeed him at his death, but cannot validly transfer his office to another during his lifetime. An appointment or nomination made during the lifetime of the *mutwalli* is revocable like other testamentary dispositions."

At page 622, the same learned author observes:

"A superintendent while alive and in good health, cannot lawfully appoint another to act for him, unless the appointment of himself were in the nature of a general trust."

20. ('34) 21 A.I.R. 1934 P. C. 77 : 56 All. 111 : 61 I. A. 50 : 147 I. C. 887 (P.C.), Allah Rakhi v. Mohammad Abdur Rahim.

21. ('39) 26 A.I.R. 1939 P. C. 185 : 183 I. C. 101 (P.C.), Saadat Kamel Hanum v. Attorney-General, Palestine.

22. ('19) 6 A.I.R. 1919 Cal. 644 : 46 Cal. 13 : 45 I. C. 581, Sultan Ahmed v. Abdul Gani.

In Baillie's Digest at page 594 it is said :

"A superintendent while alive and in good health cannot lawfully appoint another to act for him, unless the appointment of himself were in the nature of a general trust."

In 37 Cal. 263,²³ an original text is quoted at p. 274 which reads as follows :

"If the *mutwalli* of a *wakf* suffering from illness which culminates in death delegates the affairs of the *wakf* to another person, it is valid, because the *mutwalli* is in the position of an executor, and the executor has the power of appointing another as his executor."

The interpretation put upon these texts in British Indian Courts, however, has been to interdict both appointment and nomination. In 9 C. W. N. 876,²⁴ a question arose whether one W. H. was a validly appointed *mutwalli*. It was contended that he was not, as the *mutwalli* appointing him was not suffering from a death-bed illness at the time of his appointment. The appointment was, however, upheld by a Bench of the Calcutta High Court composed of Rampini and Caspersz JJ. on the ground that when the letter appointing him was written by the dying *mutwalli*, he was in apprehension of approaching death and had as a matter of fact died within six weeks. In A. I. R. 1935 Cal. 623,²⁵ Mitter J. made the following observations :

"A *mutwalli* has only power to nominate his successor in death-bed, but he has no right to appoint his successor in his own lifetime and in health and withdraw from the management of the *wakf* or transfer or assign his office during his lifetime and while in good health, unless his powers are 'general,' or as the authorities put it, 'unless the consignment was made to him in a general manner'."

In A. I. R. 1930 ALL. 169²⁶ decided by Sen and Niamatullah JJ., it is remarked that under the Muhammadan law, a *mutwalli* who is not the founder of the trust has no power whilst in health to appoint a successor. In A. I. R. 1941 Lah. 36,²⁷ Tek Chand J., who wrote the principal judgment in concurrence with Dalip Singh J., observed :

"After examining the evidence and hearing counsel at length we have no hesitation in holding that it has not been established that S. M. was suffering from *marz-ul-maut* at the time when he had nominated Mt. K, as his successor. As stated above, the will was executed on 17th July 1938, and all that is proved is that he was suffering

from diarrhoea at the time. He died seven months later and in the death register the cause of his death is described as 'general debility due to old age.' Now, neither diarrhoea nor general debility due to old age can be called mortal maladies nor is there any evidence on the record to establish that at the time of the execution of the will the testator had a preponderance of the apprehension that death was imminent. It cannot, therefore, be said that he was suffering from *marz-ul-maut*. It is conceded that under Muhammadan law the nomination of his successor by the *mutwalli* for the time being is valid only if it is made while he was in death illness. But as this had not been established in this case, the nomination of Mt. K, as *mutwalli* by S. M. assuming that he had the power to do so cannot be held to be valid."

In my view, however, if appointment means the complete surrender of his office by the appointer and its immediate transfer to the appointee, the principle enunciated is quite in accord with Muhammadan law. But if it is intended to convey that a *mutwalli* for the time being cannot even nominate his successor who is to act as such after his death, with all respect, I am disposed to think that the Muhammadan law on the subject has not been properly appreciated. One can well understand the prohibition against a person who has been deputed to occupy a position of trust in respect of certain property not to divest himself of his responsibility at his own discretion and throw it on the shoulders of another, when he himself is in perfect health and can properly discharge his functions. But why to introduce the same prohibition when he is only to nominate a person who is to take office after his death is altogether incomprehensible. Why, one pauses to think, should a *mutwalli* be permitted to nominate a successor only when his intellect and reason may possibly be impaired and not when he is in full enjoyment of these faculties? In 41 C. W. N. 624,²⁸ a similar contention was raised before their Lordships of the Privy Council and although the matter was not finally decided, Sir Shadi Lal, who delivered the judgment of the Board, expressed himself in a manner which would indicate that their Lordships were not impressed with it at all. His Lordship remarked :

"The defendant, however, urges that the rule allowing the incumbent of the office to nominate his successor, which derives its authority from the Muhammadan law, prescribes that the nomination can be valid only if it was made while the incumbent was on his death-bed, or was suffering from a mortal illness, but not when he was in good health. This contention, which appears to be supported by some authorities on the Muhammadan law, would prevent a *mutwalli* from appointing his successor if he died suddenly without any expecta-

28. ('37) 41 C.W.N. 624 (P. C.), Ahsanullah Shah v. Ziauddin Shah.

23. ('10) 37 Cal. 263 : 3 I. C. 419, Khajeh Salimullah v. Abul Khair M. Mustafa.

24. ('05) 9 C. W. N. 876, Sk. Amir Ali v. Sd. Wazir Hyder.

25. ('35) 22 A. I. R. 1935 Cal. 623 : 158 I. C. 544, Md. Soleman Molla v. Tasaddug Hossain.

26. ('30) 17 A. I. R. 1930 All. 169 : 52 All. 368 : 123 I. C. 369, Ghazanfar Husain v. Mt. Ahmadi Bibi.

27. ('41) 28 A. I. R. 1941 Lah. 36 : 193 I. C. 323, Mt. Kammon v. Allah Bakhsh.

tion of death, and render ineffective any appointment made by him at a time when he was not on his death-bed or suffering from such illness."

In my view, this insistence on even the nomination to be made on death-bed is not in any way supported by Muhammadan law. When the texts lay down that a valid appointment of a successor can only be made on death-bed, they deal with the actual transfer of the office at once and not with the nomination of a successor, who is to take office only after the death of the *mutwalli*. Those judgments, therefore, which have interpreted these texts so as to mean that even a nomination to be valid must be made on death-bed have, if I may say so with all respect, ignored the distinction between appointment and nomination. But even if some Muhammadan jurists have taken the extreme view adumbrated above, it is not absolutely essential that their opinion should be allowed to prevail. As observed by Ameer Ali in his Muhammadan Law, Vol. I, page 259:

"in the law relating to *wakf* there are certain primary rules on which the principal doctors are in agreement. With regard to the subsidiary principles there is considerable divergence. The primary rules are, (a) that the subject of the *wakf* should be dedicated in perpetuity; (b) that all human right should be divested therefrom; and (c) that it should be made non-heritable and inalienable. With regard to these there is consensus."

In the matter of subsidiary rules, however, as stated by the same learned author at page 258:

"The *kazi* is authorised to construe liberally the legal principles and to apply them in a manner most consistent with justice and expediency."

A British Indian Court which now functions in place of a *kazi* may not be in a position to interfere in any manner with the primary rules, but the subsidiary rules cannot be as sacrosanct as the primary ones. In the matter of this rule, therefore, which is obviously subsidiary, I would use the powers vested in a *kazi* and hold that a *mutwalli* is in no way debarred from nominating his successor by will even when he is in good health, as to decide differently would be simply unjust and inexpedient. Even otherwise, a document of a testamentary character, as remarked by Richardson and Walmsley JJ. in 46 Cal. 13²⁹ (at page 18) speaks as from the moment of death. The appointment of Jamil-ur-Rehman, therefore, was perfectly valid in the eye of the Muhammadan law. Before concluding, I would observe that even if it be conceded that the *wakf* in question was not public within the

meaning of S. 92, Civil P. C., as held by the Punjab Chief Court in the three cases that came before it, there is no danger of the *wakf* property being wasted or destroyed in this case, inasmuch as Act 42 [XLII] of 1923 clearly governs such *wakfs*. If any authority is needed for this proposition, reference may be made to in 37 C. W. N. 395³⁰ and 4 Luck. 429.³¹ Any person, therefore, who is interested in this *wakf* is at liberty to take action under that Act and call upon the persons in charge to render accounts and to satisfy the Court that the income is being spent on proper objects. Further, a *mutwalli* has no power to dispose of the *wakf* property in any shape or form and, even if any person acquires property with notice of charity charged upon it, he is as much bound by it as the person from whom he acquires it. On the grounds stated above, I would maintain the decision of the Court below, though in some respects on somewhat different grounds, and dismiss this appeal with costs. The cross-objections are also dismissed but the appellant will not be entitled to any costs in connection therewith.

Harries C. J. — I entirely agree and have nothing to add.

G.N./D.H.

Appeal dismissed.

30. ('33) 20 A. I. R. 1933 Cal. 581 : 60 Cal. 790 : 145 I. C. 638; 37 C. W. N. 395, Sd. Ali Bakhtour v. Altap Hossain.

31. ('29) 16 A. I. R. 1929 Oudh 225; 4 Luck. 429: 117 I. C. 739 (F.B.), Shabbir Husain v. Ashiq Husain.

[Case No. 39.]

A. I. R. (33) 1946 Lahore 216

ABDUL RASHID AG. C. J. AND
ACHHRU RAM J.

Sm. Lilawati — Plaintiff —

Appellant

v.

Municipal Committee, Amritsar —

Defendant — Respondent.

Letters Patent Appeal No. 3 of 1945, Decided on 9th October 1945, from decree of Beckett J. in S. A. No. 1168 of 1943, D/- 23rd November 1944.

(a) Punjab Municipal Act (3 [III] of 1911), S. 193 (1) — Mere proposed scheme which has not yet been sanctioned does not entitle committee to refuse sanction under sub-s. (1).

Sub-section (1) of S. 193, makes it imperative for the Municipal Committee or the Executive Officer to refuse to sanction the erection or re-erection of a proposed building only where it is calculated to contravene any scheme that has actually been sanctioned under sub s. (3) or (4) of S. 192. A mere proposed scheme which has not yet been sanctioned does not entitle the Municipal Committee or the Executive Officer to refuse sanction under this sub-

29. ('19) 6 A. I. R. 1919 Cal. 644 : 46 Cal. 13 : 45 I. C. 581, Sultan Ahmad v. Abdul Gani.

section. So far as this sub-section is concerned, it is wholly immaterial whether the Municipal Committee is merely contemplating to draw a scheme or has actually drawn it up and submitted it to the Provincial Government for sanction : ('41) 28 A.I.R. 1941 Lah. 200, *Rel. on.* [P 218 C 1]

(b) Punjab Municipal Act (3 [III] of 1911), S. 193 (2) — Sub-s. (2) does not apply merely because proposed building is likely to interfere with proposed town planning scheme.

In order to attract the application of sub-s. (2) of S. 193 the sanction must be refused for any reason which the Executive Officer or the Municipal Committee deems to be just and sufficient as affecting the proposed building and such reason has to be communicated in writing to the applicant. Where the order of the Executive Officer simply says that the sanction is refused because the proposed building will interfere with the proposed town planning scheme and no reason affecting the building itself is given in the said order, sub-s. (2) does not apply. [P 218 C 2]

(c) Interpretation of statutes — Statutory provision clear and not covering particular case — Hardship to any party will not justify extension of scope of provision.

The mere possibility of a hardship to one party or the other will not justify a Court of law in extending the scope of a statutory provision which is otherwise clear and does not cover the case. [P 219 C 1]

(d) Punjab Municipal Act (3 [III] of 1911), S. 193 (2) — Sub-s. (2) does not give power to refuse sanction merely because erection of building, if permitted, will result in inconvenience to other persons.

The language of sub-s. (2) of S. 193 is perfectly clear. It enables the Municipal Committee or the Executive Officer only to refuse sanction for a reason which is just and sufficient as affecting the proposed building itself. It is not possible to read into it a provision giving the Municipal Committee or the Executive Officer power to refuse sanction because there is reason to believe that the erection, if permitted, will result in difficulties or inconveniences to other persons. [P 219 C 2]

D. N. Agarwal — for Appellant.

Shamair Chand — for Respondent.

Achhru Ram J. — On 2nd August 1941 Sm. Lilawati, appellant in the present Letters Patent appeal, made an application to the Municipal Committee of Amritsar for permission to build a house. On 10th September 1941, the Executive Officer of the Municipal Committee decided to refuse sanction and a written intimation was sent to the applicant that the sanction had been refused because the proposed building would interfere with the town planning scheme. On 20th December 1941, Sm. Lilawati brought a suit against the Municipal Committee for the grant of a mandatory injunction directing the defendant to sanction the plaintiff's building plan, alleging that no town planning scheme was in existence or in contemplation, that near the plaintiff's site a scheme at that stage was out of ques-

tion, and that the action of the Executive Officer in refusing to sanction the erection of the building was an abuse of the power invested in the committee and was unreasonable, arbitrary, capricious, oppressive and partial. The defence of the Municipal Committee was that there was a town planning scheme in contemplation, that the building proposed to be erected by the plaintiff interfered with a proposed road in the said town planning scheme, and that the action of the Municipal Committee in refusing to sanction the erection of the proposed building was legal. On the pleadings of the parties, the trial Court framed the following issues :

(1) Whether civil Courts have no jurisdiction to try this case?

(2) Whether the defendant committee could legally reject the plan submitted by the plaintiff on the ground that it would interfere with a proposed town planning scheme for the area in which the plaintiff wanted to construct the building?

(3) If issue 2 goes in favour of the defendant whether on the date when the plaintiff's application was rejected, there was town planning scheme for the area mentioned above in contemplation?

(4) Relief.

Issue 1 was decided in the plaintiff's favour. On issue 3, it was held that there was, on the date when the plaintiff's application was rejected, a town planning scheme for the area actually in the course of preparation. On issue 2 it was held that the committee could legally reject the plan submitted by the plaintiff, on the ground that it would interfere with a town planning scheme for the area which was in the course of preparation. A Division Bench judgment of this Court reported in I.L.R. (1941) Lah. 278¹ which was relied on by the plaintiff in support of his contention that it was not within the power of a Municipal Committee to refuse to sanction a proposed building on the ground that its erection was likely to interfere with a town planning scheme which was in contemplation was distinguished on the ground that in that case the preparation of the scheme had not yet started. On these findings, the plaintiff's suit was dismissed. On an appeal by the plaintiff the learned Senior Subordinate Judge of Amritsar agreed with all the findings given by the learned trial Judge and affirmed his decree dismissing the suit. A second appeal by the plaintiff was heard by a learned Single Judge of this Court who held that it was clearly reasonable for a committee to refuse sanction to a building which would seriously interfere

1. ('41) 28 A.I.R. 1941 Lah. 200 : I. L. R. (1941) Lah. 278 : 196 I. C. 70, Administrator, Lahore Municipality v. Muniruddin Sheikh.

with a scheme which has already been prepared and submitted to the Government for sanction, and that accordingly the order made by the Executive Officer of the Municipal Committee in the present case was not open to question on any legal ground. The plaintiff's appeal having been dismissed by the learned Single Judge she has filed a Letters Patent appeal. The relevant portion of S. 193, Punjab Municipal Act, which enables a Municipal Committee or its Executive Officer to refuse to sanction the erection or re-erection of any building reads as follows :

"(1) The Committee or Executive Officer shall refuse to sanction the erection or re-erection of any building in contravention of any bye-law made under sub-s. (1) of S. 190 or in contravention of any scheme sanctioned under sub-s. (3) or sub-section (4) of S. 192, unless it be necessary to sanction the erection of a building in contravention of such a scheme owing to the Committee's inability to pay compensation as required by S. 174 for the setting back for a building. (2) The Committee or Executive Officer may refuse to sanction the erection or re-erection of any building for any other reason, to be communicated in writing to the applicant, which it or he deems to be just and sufficient as affecting such building, or if the land, on which it is proposed to erect or re-erect such building, is Government property, or vests in the Committee, and the consent of Government or the Committee has not been obtained, or if the title to the land is in dispute between such person and the Committee or the Government."

It is not the Municipal Committee's case that the proposed building was calculated to contravene any bye-law made under sub-s. (1) of S. 190 nor is it the Committee's case that the said building if allowed would have contravened any scheme sanctioned under sub-s. (3) or sub-s. (4) of S. 192. Sub-section (1) of S. 193 is, therefore, clearly inapplicable. That sub-section makes it imperative for the Municipal Committee or the Executive Officer to refuse to sanction the erection or re-erection of a proposed building only where it is calculated to contravene any scheme that has actually been sanctioned under sub-s. (3) or sub-s. (4) of S. 192. A mere proposed scheme which has not yet been sanctioned does not entitle the Municipal Committee or the Executive Officer to refuse sanction under this sub-section. So far as this sub-section is concerned, it is wholly immaterial whether the Municipal Committee is merely contemplating to draw a scheme or has actually drawn it up and submitted it to the Provincial Government for sanction. In view of the clear language of the sub-section the distinction sought to be made by the Courts below, between the facts of the present case and those of the

Division Bench judgment mentioned above really does not exist. The Division Bench was dealing with a question of the interpretation to be placed on the afore-said sub-section and rightly held that sub-section inapplicable to cases where the town planning scheme had not yet been finally sanctioned. The circumstance that in that case the scheme had not yet even been drawn up did not and could not influence the decision of the question.

Mr. Shamair Chand, the learned counsel for the respondent, had to concede that the order of the Executive Officer could not possibly be justified under sub-s. (1) of S. 193. He sought to bring his case within the four corners of sub-s. (2) and contended that an Executive Officer or a Municipal Committee have a discretion to refuse to sanction the erection or re-erection of any building under that sub-section where the building is likely to contravene any town planning scheme which is in the course of preparation. It has, however, to be observed that in order to attract the application of sub-s. (2), the sanction must be refused for any reason which the Executive Officer or the Municipal Committee deems to be just and sufficient as affecting the proposed building, and such reason has to be communicated in writing to the applicant. Now in the present case, the order of the Executive Officer, which was communicated to the applicant is contained in Ex. P-1 and it simply says that the sanction is refused because the proposed building will interfere with the town planning scheme. No reason affecting the building itself is given in the said order. The language of the order communicated to the applicant, therefore, clearly excludes the applicability of the sub-section. In the written statement filed on behalf of the Municipal Committee again no attempt was made to justify the order refusing sanction on the ground that refusal was necessary or desirable for any reason affecting the building itself. All that was stated was that the proposal of the applicant to construct the building interfered with the proposed road in the town planning scheme. The mere circumstance that the proposed building was likely to affect or interfere with a road proposed to be brought into existence by the Municipal Committee could not bring the case within the four corners of sub-s. (2). It was obviously not a reason for refusal of sanction which could be deemed to be just and sufficient as affecting the proposed building. I am accordingly of the opinion

that in the first instance, on the language of the order as also of the pleadings, it is not open to the Municipal Committee to derive any benefit from sub-s. (2) of S. 193 or to seek to bring its case within the purview of that sub-section. In any event, in the present case on the facts disclosed, the refusal is not covered by that sub-section.

It was urged by Mr. Shamair Chand that if a Municipal Committee or an Executive Officer have no power to refuse to sanction a building, which if allowed to be constructed, will materially interfere with a building scheme which has not yet been sanctioned but which is awaiting sanction, it will be open to the people to render the scheme infructuous and useless by rushing the Municipal Committee with applications for sanction while the scheme is being considered by the Provincial Government. In the first place, the mere possibility of a hardship to one party or the other will not justify a Court of law in extending the scope of a statutory provision which is otherwise clear and does not cover the case. In the second place, it is not right to say that in circumstances like those mentioned by Mr. Shamair Chand a Municipal Committee or an Executive Officer will be entirely powerless. The Municipal Act does contain a provision for the Municipal Committee or the Executive Officer serving an applicant with a notice not to proceed with the construction of the proposed building while the application for sanction is pending. In a case where an application for permission to build is made while a town planning scheme is in the course of preparation, and it is feared that the proposed building will interfere with such a scheme, all that the Municipal Committee has got to do is not to make any order one way or the other on the application but to keep it pending, and in the meanwhile to expedite the scheme being sanctioned and eventually to pass appropriate orders on the application.

Reliance was placed by Mr. Shamair Chand on a Division Bench judgment of this Court reported in A. I. R. 1944 Lah. 19.² In that case although the town planning scheme was only in the course of preparation at the time sanction was refused it was actually sanctioned before the institution of the suit, and all that was held by the Court was that under such circumstances the discretionary relief in the shape of a mandatory injunction could not be granted. In the pre-

sent case, we gave Mr. Shamair Chand an opportunity to find out if the town planning scheme which is said to have been in the course of preparation on 10th September 1941 when sanction to the proposed plan was refused had since been sanctioned. He after consulting his client has informed us today that no scheme has so far been sanctioned. More than four years have passed since the refusal of the application and yet there is no sanctioned scheme in existence. The reasoning of the Division Bench in I.L.R. (1941) Lah. 278¹ applies with full force to the present case. It is certainly neither desirable nor just that a Municipal Committee should be able to withhold permission for the erection of a building on the ground of a town-planning scheme being in the course of preparation, even though such scheme remains in the course of preparation and is not sanctioned for as many as four years. The learned Single Judge was of the opinion that sub-section (2) of S. 193, though not very happily worded, was really intended merely to exclude such reasons as a disputed title and was intended to include any reason based on difficulties or inconveniences which the erection of the building would create. With due deference I find myself unable to accept this view as to the interpretation to be placed on the aforesaid sub-section. The language of the sub-section is perfectly clear. It enables the Municipal Committee or the Executive Officer only to refuse sanction for a reason which is just and sufficient as affecting the proposed building itself. It is not possible to read into it a provision giving the Municipal Committee or the Executive Officer power to refuse sanction because there is reason to believe that the erection if permitted will result in difficulties or inconveniences to other persons. For the reasons given above, I am of the opinion that the refusal to sanction the building proposed to be erected by the plaintiff appellant was in excess of the legal powers of the Executive Officer and of the Municipal Committee and was, therefore, *ultra vires*. I would accordingly allow this appeal and setting aside the judgments and the decrees of the Courts below grant the plaintiff a decree for a mandatory injunction directing the defendant not to stand in her way of erecting the building according to the plan submitted by her to the Municipal Committee on 2nd August 1941. The appellant will get her costs in all the Courts.

Abdul Rashid, Ag. C. J.—I agree.

D.S./D.H. _____ *Appeal allowed.*

2. (44) 31 A. I. R. 1944 Lah. 19 : 211 I. C. 612, Administrator, City of Lahore v. Suraj Bhan.

[Case No. 40.]

A. I. R. (33) 1946 Lahore 220

ABDUL RASHID AG. C. J. AND
ACHHRU RAM J.

*University of Punjab, Lahore, and
another — Defendants — Petitioners*
v.

Jaswant Rai — Plaintiff —

Respondent.

Civil Revn. No. 847 of 1944, Decided on 2nd
October 1945, from order of Munir J., D/- 17th
July 1945.

(a) Evidence Act (1872), S. 124 — Public
officer — Vice-Chancellor of Punjab Univer-
sity is public officer.

The term 'public officer' in S. 124, Evidence
Act, cannot be given the same meaning as has
been assigned to that term in S. 2 (17), Civil P. C.
In the absence of a definition in the General
Clauses Act, the term must be given its ordinary
dictionary meaning. The term must be construed
to be an officer with public, as opposed to private,
duties, who receives communications made to him
in official confidence of such a nature that dis-
closure in certain cases would injure the public
interests. [P 220 C 2; P 222 C 1]

The Vice-Chancellor of the Punjab University is
appointed by the Chancellor who in turn is ap-
pointed by the Governor-General in the exercise of
his individual judgment. The activities of the
University and the duties performed by the Vice-
Chancellor are effectively controlled and supervised
by the Central and Provincial Governments. The
duties of the Vice-Chancellor are undoubtedly of a
public character as they concern the regulation of
educational activities in the province. In these
circumstances, the Vice-Chancellor when perform-
ing these public duties is acting as a public officer
and is a public officer within the purview of S. 124,
Evidence Act. [P 221 C 1, 2]

(b) Evidence Act (1872), S. 124 — Public
officer — Test — Receiving emoluments is not
main test.

The question of emoluments cannot be consider-
ed to be the main test in interpreting the term
'public officer': (18) 5 A. I. R. 1918 Mad. 763,
Rel. on. [P 221 C 2]

R. C. Soni — for Petitioners.

Gyan Singh Vohra — for Respondent.

ORDER OF REFERENCE

Munir J. — The question involved in
this case, namely, whether the Vice-Chan-
cellor of the Punjab University is a public
officer within the meaning of S. 124, Evi-
dence Act, is of considerable importance and
parties agree that it should be answered by
a Division Bench. I, therefore, refer this
case to a Division Bench under Proviso (a)
to R. 1, Chap. 3E, Vol. V of the Rules and
Orders. The case may, if possible, be heard
early in October, as the suit in which the
question has arisen has been pending since
the beginning of 1943.

Judgment of the Division Bench

Abdul Rashid, Ag. C. J.—The sole ques-
tion for determination in this civil revision
is, whether the Vice-Chancellor of the Pun-
jab University is a 'public officer' within
the purview of S. 124, Evidence Act. The
lower Court has held that the Vice-Chan-
cellor of the Punjab University is not a
'public officer.' As the Evidence Act, and
the General Clauses Act contain no defini-
tion of the term 'public officer' the lower
Court has based its decision on the definition
of the term 'public officer' as given in sub-
s. (17) of S. 2, Civil P. C.

On behalf of the Vice-Chancellor of the
Punjab University it has been contended by
Mr. Soni that the lower Court has gone
wrong in holding that the term 'public
officer' in S. 124, Evidence Act, shall be
given the same meaning as has been as-
signed to this term in S. 2, Civil P. C. The
opening words of S. 2 of the Code make it
clear that the definitions of the various
terms in the section are meant for the pur-
pose of interpreting the terms as used in the
Civil Procedure Code. For the purposes of
interpreting the term 'public officer' as used
in S. 124, Evidence Act, we must resort to
the definition given in the General Clauses
Act. If no definition of this term can be
found in the General Clauses Act, the term
will have to be given its ordinary dictionary
meaning.

The first point on which considerable
emphasis was laid by Mr. Soni was that the
Vice-Chancellor of the Punjab University
carries out functions that have been dele-
gated to him by the Government, Provincial
and Central, under the provisions of the
Punjab University Act, 1882, and the Indian
Universities Act, 1904. The Punjab University
was established at Lahore by the Punjab
University Act of 1882. The University was
constituted as a body corporate with power
to acquire and hold property and to do all
other things necessary for the purposes of
its constitution. Under S. 4 of the Act the
Governor-General, exercising his individual
judgment, was given the power to nominate
the Chancellor of the University. The Vice-
Chancellor was to be appointed by the
Chancellor from time to time. By S. 19 it
was enacted that it shall be the duty of the
Central Government to require that the pro-
ceedings of the University shall be in con-
formity with this Act and with the statutes,
rules and regulations for the time being in
force. The Central Government was entitled

to exercise all powers necessary for giving effect to its requisitions and the Central Government could annul by notification any such proceedings of the University which were not in conformity with the Act. By S. 20, it was laid down that all appointments made under S. 5, all appointments cancelled under S. 8 and all degrees, diplomas, etc., conferred shall be notified in the Official Gazette wherein also the record of the proceedings of every meeting of the Senate shall be published. By means of S. 21, the University was required to submit the accounts of income and expenditure once in every year to the Central Government for such examination and audit as the Central Government may direct. The powers of superintendence and effective control by the Central and Provincial Governments conferred by the Punjab University Act of 1882 were considerably enlarged by the Indian Universities Act of 1904. If the Central and the Provincial Governments so chose, every activity of the University could be effectively supervised and controlled by the Government. It was urged that it was the function of the Government to make proper arrangements for the education of its subjects and that this function of the Government was delegated to the Punjab University, and the Vice-Chancellor being the Chief Executive Officer of the Punjab University was exercising the functions of the Government delegated to it under the provisions of the Punjab University Act.

The second point taken up by Mr. Soni was that the term 'public officer' in S. 124, Evidence Act, was not used in any restricted or technical sense. It was open to the Court, in the absence of any definition of this term in the General Clauses Act, to give the term "public officer" its ordinary English meaning. According to the learned counsel the principal test for determining whether a certain person was or was not a public officer, within the purview of S. 124, Evidence Act, was whether the person was discharging public duties as distinguished from private or personal functions. If a person was discharging duties which were assigned to him by means of a Statute and Rules and Regulations made thereunder and if those duties were of a public character, the person discharging such duties must be held to be a "public officer." It has already been pointed out that the Vice-Chancellor is appointed by the Chancellor who in turn is appointed by the Governor-General in the exercise of his individual judgment. The

activities of the University and the duties performed by the Vice-Chancellor are effectively controlled and supervised by the Central and the Provincial Governments. The duties of the Vice-Chancellor are undoubtedly of a public character as they concern the regulation of educational activities in the Province. In these circumstances I am of the opinion that the Vice-Chancellor when performing these public duties is acting as a public officer. Reference may be made in this connexion to the case in 40 Mad. 125¹ at p. 160 where it was held that the Syndicate of the Madras University was a statutory body of persons holding "public office" within the meaning of S. 45, Specific Relief Act. Though no emoluments were attached to that office, where a statute appointed a body of persons to carry out functions of public interest the persons constituting such a body *ipso facto* became holders of a public office. It was pointed out by the learned Advocate-General in that case that the definition of the words "public officer" in the Civil Procedure Code afforded a valuable guide in construing the meaning of the words "public office" in S. 45, Specific Relief Act. It was further urged that one important test would be whether the person holding a public office receives any emoluments. These arguments of the Advocate-General were repelled by the learned Judges and they came to the conclusion that the definition of the words "public officer" as given in the Code of Civil Procedure could not be taken as a valuable guide in construing the meaning of the words "public office" as used in S. 45, Specific Relief Act. The question of emoluments was also not considered to be the main test for interpreting the term "public officer." With all respect I am in complete agreement with the observations made by the learned Judges of the Madras Court in the case referred to above.

Reference may also be made in this connection to the case in 14 Luck. 351² at p. 358. The question for consideration in that case was whether the Court of Wards can be regarded as a public officer within the purview of S. 124, Evidence Act. It was observed that the supervision and control of the Court of Wards by the Government is great and under S. 8 read with S. 12

1. (18) 5 A.I.R. 1918 Mad. 763 : 40 Mad. 125: 38 I.C. 847, In re G. A. Natesan.

2. (39) 26 A.I.R. 1939 Oudh 65 : 14 Luck. 351 : 178 I. C. 982, Chandra Dhar Tewari v. Deputy Commissioner, Lucknow.

of the Court of Wards Act the Government can compel the Court of Wards to assume superintendence of the property of certain females and certain persons declared by the Government to be incapable to manage or unfitted to manage their own property. The term "public officer" in S. 124 must, therefore, be construed to be an officer with public, as opposed to private, duties who receives communications made to him in official confidence of such a nature that disclosure in certain cases would injure the public interests. In these circumstances, it was held that the Court of Wards, for the purposes of S. 124, should be taken to be a Government officer.

Mr. Soni also relied on the meaning of the term "public" given in the Oxford Dictionary but it is unnecessary to refer to it in any detail. The principal argument on behalf of the respondent was that the words "public officer" are synonymous with the term "Government servant" and that as the Vice-Chancellor of the Punjab University was not a Government servant and was not in receipt of emoluments from the public revenues he could not be regarded as a "public officer." The learned counsel was unable to cite any authority to the effect that the words "public officer" must be given the same restricted meanings as have been given to the words "Government servant" in certain reported cases. The learned counsel in this connection relied on A. I. R. 1940 Mad. 831³ and A. I. R. 1930 Mad. 844.⁴ The question for consideration in both of these cases was whether certain officers could be regarded as "public officers" for the purposes of giving notice under S. 80, Civil P. C. The learned Judges confined their attention to the definition of the term "public officer" as given in S. 2, Civil P. C., and came to the conclusion that those particular officers could not be regarded as public officers. Section 124, Evidence Act, was not alluded to and did not form the subject-matter of consideration in these cases. These cases are not, therefore, of any assistance to the respondent. I am of the opinion, for reasons already given, that the term 'public officer' as used in the Evidence Act cannot be given the same meanings as have been assigned to this term in S. 2, Civil P. C.

Mr. Soni also contended that passing the

3. ('40) 27 A.I.R. 1940 Mad. 831 : I. L. R. (1940) Mad. 929 : 194 I.C. 769, Kuppu Govinda Chettiar v. Uttukottai Co-operative Society.

4. ('30) 17 A. I. R. 1930 Mad. 844 : 128 I. C. 161, Vasudeva Rao v. Municipal Council, Anantapur.

B. T. examination does not confer a status or a legal character on the student who passes such an examination and that therefore no suit is competent for a declaration to the effect that the defendant be directed to declare the plaintiff as having successfully passed the B. T. examination. This question has so far not been considered by the trial Court. Mr. Soni contended that as there was no specific issue on this point, this question, though of great importance, was not likely to be determined by the trial Court. In my opinion, issue 8 is sufficiently wide to cover the point raised by Mr. Soni. As the trial Court has not considered this aspect of the case, I am not prepared to express any opinion on this point. It would be for the trial Court to determine this question when the case is remitted to it.

For the reasons given above, I would accept this petition for revision, and set aside the order of the trial Court, dated 5th December 1944 directing the Vice-Chancellor of the Punjab University to produce the documents containing the result of the B.T. examination of 1942. The case will now be remitted to the trial Court for further proceedings. Having regard to all the circumstances, I would leave the parties to bear their own costs in this Court. The parties have been directed to appear in the trial Court on 3rd November 1945.

Achhru Ram J. — I agree.

G.B./D.H.

Case remitted.

— — —
[Case No. 41.]

A. I. R. (33) 1946 Lahore 222

**TEJA SINGH AND MOHAMMAD
SHARIF JJ.**

*Dalel Ram Sarup and others
Convicts;— Appellants*
v.

Emperor.

Criminal Appeal No. 649 of 1945, Decided on 20th December 1945, from order of Sessions Judge, Delhi, D/- 27th June 1945.

(a) Penal Code (1860), S. 149 — "Common object" explained.

The phrase "common object" is the central fact on which the liability of persons other than the actual doer of the act depends. The word "object" means the purpose, intention or design and, in order to make it "common", it must be possessed by all. There must be a community of an object which may, however, exist up to a certain point only, beyond which they may differ in their objects and the knowledge possessed by each member of what is likely to be committed in prosecution of the common object will vary not only according to the information at their command but also according to the extent to which he shares the community of

objects, and as a consequence of this, the effect of S. 149 may be different on different members of the same unlawful assembly. The common object has to be determined with reference to the facts and circumstances of each case. [P 225 C 1]

(b) Penal Code (1860), S. 149 — "Knew to be likely to be committed" — Meaning explained — Accused A, B, C and D singing in front of house of deceased — On deceased objecting to it, they catching hold of lathis and attacking deceased with intent to give him mild beating — D shooting deceased with pistol and killing him — Fact that D had gun not known to other accused — Accused other than D held could not be guilty under S. 302 read with S. 149.

The second alternative of S. 149 is intimately connected with the first. One has to go back to the question "what was the common object." The expression "knew to be likely to be committed" imports at least an expectation founded upon facts known to the members of the assembly that an offence of a particular kind committed would be committed. It means something more than a speculation that such an offence might happen to be committed : ('15) 2 A.I.R. 1915 Lah. 418, *Ref.* [P 225 C 2]

Since S. 149 deals with constructive liability, it must be construed very strictly. A person may join an unlawful assembly with an unlawful object, but it does not necessarily follow that he indorses all that the other members say or do. Nor is he, therefore, responsible for their acts of which he was not clearly cognizant. [P 227 C 1]

Accused A, B, C and D were singing in a street in front of the house of the deceased. The deceased objected to this whereupon the accused got angry and caught hold of lathis and attacked the deceased with the intention of giving him a mild beating. One of the accused, D, caught hold of a pistol and shot the deceased as a result of which he died. The entire affair was a work of a few seconds and it could not be known that D had taken up a pistol. The knowledge came at the time when it was actually used. Further it could not be known whether the pistol would be employed in scaring away people or killing them:

Held that the accused other than D could not be convicted under S. 302 read with S. 149 : *Case law referred.* [P 227 C 1]

(c) Penal Code (1860), Ss. 146, 147, 149 and 323 — More injuries than one caused by members of unlawful assembly — They can be convicted of offences both under S. 147 and S. 323 read with S. 149.

Under S. 146 the actual use of force and not merely a show of force is necessary and the force must be in prosecution of the common object. Where, therefore, more injuries than one are caused by the members of the unlawful assembly they can be convicted of offences both under S. 147 and S. 323 read with S. 149. Beyond the first injury the subsequent injuries, though inflicted in pursuance of the same common object, would be distinct injuries justifying a conviction under S. 323. But if no injury other than a simple hurt was caused a separate sentence may not be necessary and a punishment under the more serious offence of rioting would suffice : ('26) 13 A. I. R. 1926 All. 225, *Rel. on.* [P 228 C 2; P 229 C 1]

Mukand Lal Puri — for Appellants.

Bishen Narain and Bhagwat Dayal for Advocate-General — for the Crown.

Mohammad Sharif J. — This judgment will dispose of two appeals, Nos. 649 and 650 of 1945. The four appellants in both the appeals were jointly tried by the learned Sessions Judge, Delhi, on two counts: (1) under S. 148, Penal Code, for having formed an unlawful assembly along with one Dalip Singh, absconder, armed with deadly weapons with the common object of causing the death of Hira Singh, deceased, and causing injuries to Sarup Singh, Badlu and Suraj Bhan P. ws. and (2) under S. 302, read with S. 149, Penal Code, for being members of the said unlawful assembly and, in prosecution of the common object of which, viz., to murder Hira Singh, Dalel fired his pistol at Hira Singh which caused his death. They were found guilty on both these charges and, by order dated 27th June 1945, sentenced as follows: Dalel to death under S. 302, Penal Code, and the others to transportation for life under S. 302 read with S. 149, Penal Code, and each of the accused was also sentenced to two years' rigorous imprisonment under S. 148, Penal Code, the sentences to run concurrently in the case of the accused awarded transportation for life. All the convicts appeal and the case is also before us for confirmation of the death sentence against Dalel under S. 374, Criminal P. C.

The facts are short and simple. On 26th January 1945, a little before sunset, Dalel, Dalip Singh, absconder, Maha Singh and Daryao Singh, sons of Ram Sarup, and Hukam, who were old associates, were singing songs in the street near the house of Hira Singh, deceased, who himself at the time was sitting on the platform of Sarup Singh's house along with Sarup Singh, Badlu and Suraj Bhan, son of Sarup Singh. The deceased asked the accused not to sing within the hearing of their women folk. The accused took offence and started abusing. Sarup Singh and the deceased protested. The accused cried out: "We shall teach you a lesson," and immediately Maha Singh and Daryao Singh brought out *lathis* from their house; Dalel and Dalip Singh took up pistols and Hukam had a knife in his hand and they rushed towards the deceased and his party. Sarup Singh and Suraj Bhan also took out *lathis* from their houses. Maha Singh accused gave a *lathi* blow on the head of Suraj Bhan; Daryao Singh struck Sarup Singh and Badlu also got an injury at the hands of Maha Singh. Sarup Singh defended himself with his *lathi* and gave a blow to Maha Singh. The deceased intervened and Dalel accused fired a pistol shot in

his chest. One Richhpal Singh, Head Constable, who was on the look out for a military deserter in the neighbouring village, learnt of the firing and reached the village at about 10 P. M. He recorded the statement of Hira Singh and sent it to the police station on which the first information report was drawn up. Hira Singh was taken to Irwin Hospital at Delhi where he remained under treatment till 5th February 1945 when he died. According to medical opinion, the weapon was fired from in front and a little to the left of the deceased from a near distance. The other persons injured were Badlu P. W. who had two contusions, Sarup Singh P. W. who had one superficial contused wound and Suraj Bhan P. W. who too had one contused wound on the back and left side of the head. All these injuries were of simple nature and caused by some blunt weapon. Out of the accused Maha Singh had an abrasion on the inner side of the left ankle. This was also simple and caused by blunt weapon.

The prosecution story is supported by Sarup Singh P. W. 4, Suraj Bhan P. W. 5 and Badlu P. W. 6, whose presence at the spot cannot be disputed by the very fact that they carry marks of injuries on their persons. The other P. Ws. are Ramji Lal P. W. 7 and Sohan Lal P. W. 8 who were simply tendered for cross-examination. There is nothing to doubt the veracity of these prosecution witnesses. As a matter of fact, the occurrence was not seriously disputed. In the Court of the Sessions Judge the three accused, that is, Dalel, Maha Singh and Daryao Singh, stated that they were singing religious songs in front of their house when the prosecution witnesses attacked them with *lathis*. Hira Singh deceased and Tej Singh, his son, also came from the direction of their house. Somebody not known fired a shot which hit Hira Singh. Hukam appellant denied his presence at the spot and pleaded that he was falsely implicated. Some evidence was also produced in support of this story. This evidence was rightly rejected by the learned Sessions Judge and we agree with his conclusion. The absurdity of the story is evident from the simple fact that the shot was fired from a close range and if there had been anybody else it was impossible not to have seen him and it is not shown who that other person could have the motive for doing so. This defence was not taken in the Court of the Committing Magistrate and is clearly an afterthought. It is, therefore, established that the simple

injuries were caused by Maha Singh and Daryao Singh and the shot was fired by Dalel appellant, and the presence of Hukam appellant at the spot is also established.

The real question that falls for determination in this case is what offence was committed by each of the accused. There is no dispute about their individual or separate acts. Maha Singh and Daryao Singh used the sticks and caused contusions and, other things apart, they would be guilty of S. 323, Penal Code, for causing simple hurt. Dalel fired his pistol which resulted in death and he must be held responsible for the natural consequences of his act and would, therefore, be guilty of murder under S. 302, Penal Code. It has been held that all the five accused were actually engaged in singing songs and, on objection being taken, they all wanted to punish the objectors and, for this purpose, all took up whatever they could lay their hands on. The whole thing was quite sudden and instantaneous and they at once fell on the opposite party sitting at a distance of a few yards. They were thus animated by the common desire to punish and this is what was evidently meant by "teaching a lesson" and by this act constituted themselves into an unlawful assembly within the definition of S. 141, Penal Code, and since force was used in prosecution of the common object of the unlawful assembly they were all guilty of rioting and thus punishable under S. 147, Penal Code. The effect of the nature of the weapons carried will be considered later. Now the applicability of S. 149, Penal Code, has to be seen. It is as follows :

"149. If an offence is committed by any member of an unlawful assembly in prosecution of the common object of that assembly or such as the members of that assembly knew to be likely to be committed in prosecution of that object every person who, at the time of the committing of that offence, is a member of the same assembly, is guilty of that offence."

Since Dalel has used his pistol with deadly effect it is urged by the prosecution that all the appellants would be equally guilty of murder under S. 302, Penal Code, read with S. 149, Penal Code. Section 149, Penal Code, mentions the following points: (1) That there was an unlawful assembly of which the accused was a member. (2) That he knew of the common object of the assembly. (3) That an offence was committed by a member of such assembly. (4) That it was committed—(a) either in prosecution of the common object of the assembly, or (b) such as the members of the assembly knew to be

likely to be committed in prosecution of their common unlawful object. The phrase "common object" is the central fact on which the liability of persons other than the actual doer of the act depends. The word "object" means the purpose, intention, or design and, in order to make it "common," it must be possessed by all. There must be a community of an object which may, however, exist upto a certain point only, beyond which they may differ in their objects and the knowledge possessed by each member of what is likely to be committed in prosecution of the common object will vary not only according to the information at their command but also according to the extent to which he shares the community of objects and as a consequence of this, the effect of s. 149, Penal Code, may be different on different members of the same unlawful assembly: 22 Cal. 306.¹ The common object has to be determined with reference to the facts and circumstances of each case. Anything that may be said by a rioter as well as the surrounding circumstances would be relevant. In the present case, the common object was to punish the others for their insolence in asking the accused to stop singing. The form which this punishment took was a minor blow with a stick and this was all that was really intended and but for the fortuitous interference by Hira Singh deceased the pistol might never have been fired. The charge that the accused formed an unlawful assembly with the common object of "causing the death of Hira Singh" rests on no evidence. It cannot be inferred from what subsequently happened. There ought to be direct or indirect proof of the common intention or the common purpose to murder Hira Singh when the unlawful assembly first met or moved to execute their common purpose and the very first mild use of the stick on Suraj Bhan is a direct negation of any intention to kill Hira Singh.

This is in a way conceded by the learned counsel for the Crown. It is, however, urged that the other alternative "knew to be likely" applies. The argument is that one member carried a pistol and this fact must fix the others with the knowledge that death was a likely result. In the first place, there is nothing to show that it was known that one of them had taken up a pistol. As stated above, the entire affair was the work of a few seconds only and in the heat of the moment it could not be known which had taken which weapon and the knowledge

1. ('95) 22 Cal. 306, Jahiruddin v. Queen-Empress.

came at the time they were actually used. Secondly, it could not be known whether the pistol would be employed in scaring away people or in killing them. As a matter of fact, the second alternative of s. 149, Penal Code, is intimately connected with the first. One again has to go back to the question "what was the common object." The expression "knew to be likely to be committed" imports at least an expectation founded upon facts known to the members of the assembly that an offence of a particular kind committed, would be committed. It means something more than a speculation that such an offence might happen to be committed: 16 P. R. Cr. 1915.² In 10 Luck. 320³ both the parties after an exchange of abuse had a free fight and both were armed with *lathis* but two of them had spears instead of *lathis*. While the fight was going on, one Sadal Ahir arrived on the scene and enquired why his friends were being beaten. Raghunandan accused abused him and said that he would beat him also as a nephew of Sadal had given evidence against him and thereupon he thrust his spear into the stomach of Sadal. Sadal fell down on the ground and died instantaneously. The question arose whether, in view of the murder of Sadal Ahir, constructive liability could be imputed to others by virtue of s. 149, Penal Code. The learned Judges observed:

"In the present case the common object imputed to the members of the unlawful assembly, who committed a riot in the course of which Sadal was murdered by Raghunandan, was merely to beat the members of the rival faction and it is clear from the evidence on the record that except for the unpremeditated and unintended murder of Sadal Ahir all the other members of the unlawful assembly, to which Sadal belonged, only received simple hurt and the affair out of which this riot arose was merely the sale of the fruit of certain jack fruit trees. The origin of the quarrel was insignificant and the actual infliction of harm in the present case was also of a trivial nature. It is only the individual act of the rioter Raghunandan which turned a simple village affray into a case of riot with murder. Thus, in the circumstances of this case, we are compelled to hold that the act of Raghunandan in thrusting the spear into the abdomen of Sadal Ahir was not an act in the prosecution of the common object of the unlawful assembly. It was far in excess of the common object of the unlawful assembly, which was merely to beat. Even if the common object of the unlawful assembly is to be considered in the light of the fact that two of the rioters had spears whilst all the other members of the unlawful assembly had *lathis* still that fact will not entitle us to impute to the members of the unlawful assembly an intent to

2. ('15) 2 A. I. R. 1915 Lah. 418 : 16 P. R. Cr. 1915 : 30 I. C. 737, Dhian Singh v. Emperor.

3. ('35) 22 A.I.R. 1935 Oudh 52 : 10 Luck. 320 : 153 I. C. 96, Raghunandan v. Emperor.

commit murder or culpable homicide not amounting to murder. There is nothing on the record of the present case to suggest that the appellants knew that it was likely that an act would be done by any individual member of the unlawful assembly with any of the criminal intents mentioned in the first three clauses of S. 300, Penal Code."

In the circumstances of this case Raghunandan alone was held responsible for his rash and unpremeditated act. As to the applicability of Part. 2 of S. 149, Penal Code, their Lordships observed:

"The question for determination in respect of this point is whether it could be predicated of these appellants that when they met together with the common object of beating the men of Lapta they knew that Raghunandan or Keshai was likely to make use of his spear in such a manner as to be guilty of an offence of murder, and whether they knew that such murder was likely to be committed in the prosecution of their common object. We have no hesitation in holding that upon the facts of the present case no such knowledge can be legitimately imputed to the appellants. In fact, we think it not only possible but probable that none of the appellants had before they commenced the riot and begun to beat the members of the rival faction any idea that Raghunandan was likely to use his spear in such a manner as to cause the instantaneous death of Sadal or of any other member of the rival faction. In fact we venture to say that even Raghunandan himself had no such knowledge or idea in his head before he commenced the riot."

Again at p. 331 it is observed:

"The stringency of this section, however, should not be strained so as to make every member of the unlawful assembly liable even for acts, which are not committed necessarily in the prosecution of the common object of the rioters or which are not *immediately* connected with the common object of the unlawful assembly, of which the accused are members, nor must a guilty knowledge of the likelihood of the commission of such an offence in the prosecution of the common object be imputed to all the members of the unlawful assembly in the absence of any clear evidence, direct or circumstantial, adduced on behalf of the prosecution to show that such knowledge could be so legitimately imputed to the members of the unlawful assembly before they moved to action."

I am in respectful agreement with these observations of their Lordships. The leading case on the subject is 20 W. R. Cr. 5.⁴ In this case there was a dispute about a piece of land between Fukeer Buksh and Sabid Ali which ended in a riot in the course of which a man named Tureeboollah, one of the party of the prisoners, fired a gun and killed Samad Ali. It was found that Tureeboollah was a member of an unlawful assembly of which the appellants were also members and as to Sabid Ali it was found by evidence that he directly invoked the aid of the party among whom was this Tureeboollah armed with a gun. Sabid Ali, etc., appel-

lants were held guilty of murder under Sec. 302 read with Sec. 149, Penal Code, and sentenced to transportation for life. Phear J. in the course of his judgment at p. 9, observed:

"And an offence will fall within the second alternative, if the members of the assembly, for any reason, knew beforehand that it was likely to be committed in the prosecution of the common object, though not knit thereto by the nature of the object itself. . . . it follows that in every trial of prisoners on a charge framed under the provisions of S. 149, Penal Code, even when it is proved that the specified offence was committed by one of the members of the assembly during, so to speak, the pendency of that assembly, it yet remains an issue of fact to be determined on the evidence whether that offence was committed in prosecution of the common object. . . . Returning now to the particular facts of the present case, I think there appears to be abundant reason for coming to the conclusion that Tureeboollah committed murder in the way described by the Judge. But it seems also clear that murder, or even the taking of life, was not *immediately* connected with the common object of the unlawful assembly of which the prisoners were members. That common object was, as the Judge expresses it, to drive Fukeer Buksh off the land and to prevent him from cultivating it. There is, however, nothing in the evidence to indicate that the members of the assembly were prepared, and intended to accomplish that object at all hazards of life. I do not think that they intended to attain the common object by means, if necessary, of murder. . . . Neither do I think it is satisfactorily made out by the evidence that the prisoners knew it to be likely that this offence of murder would be committed in the prosecution of the common object of the assembly within the meaning of the second part of the section, taking that object to be the driving Fukeer Buksh off the land. It was *a priori* possible, and indeed most probable, that that object would be effected without any risk of life whatever. The assailants had reason to suppose, indeed knew quite well, that the party they were about to attack was absolutely unarmed. The members of the unlawful assembly generally, including the prisoners, might reasonably have expected (and there is nothing whatever in the event to show that they did not) that Fukeer Baksh and his co-labourers would be driven off the land by the mere show of such force as they had, or at any rate by the use of force very far short of life-taking: and even if I allowed myself to be carried by the evidence so far as to think (as I do not) that the prisoners and the other members of the unlawful assembly knew that culpable homicide was likely to be committed in the prosecution of the common object, still I should be unable to say that their knowledge also included any of the ingredients of aggravation which are required in order to convert the offence of culpable homicide into the offence of murder. It is obvious that in the events which happened, those ingredients were of sudden origin and were entirely personal to the actual murderer. Tureeboollah committed murder by doing, on the spur of the moment, a previously unintended act, which act, however, he must himself be taken to have known at the time was so imminently dangerous that it must in all probability cause death, or such bodily injury as was likely to cause death and which did in fact cause death. If, then, the prisoners knew that

4. (73) 11 Beng. L. R. 347 : 20 W. R. Cr. 5 (F.B.), Queen v. Sabid Ali.

murder was likely to be committed in the shape in which it was committed, they must have been aware that it was likely one of the members of the unlawful assembly would do an act which would be *likely* to cause death, and which *would in fact* cause death—a statement which on the face of it seems to be a contradiction of terms. In truth, when the second likelihood comes to be placed upon the first, it has the effect in my judgment of removing the case altogether from the scope of section 149.”

Again, Couch J. at p. 11 observed :

“The question in this case is whether upon the evidence we can say that these persons, when they met together with the object of driving Fukeer Buksh and his party off the land, supposing they knew that Tureeboollah had a gun with him, knew also that he was likely to make use of it in such a manner as to be guilty of the offence of murder. Seeing what is necessary to constitute that offence, I am unable upon this evidence to come to the conclusion that these persons knew that this was likely. I think it is not only possible, but probable, that they did not think that the gun would be used in that manner by Tureeboollah. And it seems to me, upon the finding of the Sessions Judge, that it was so because he appears to have thought that the use of the gun was sudden and probably unintended. He seems to have thought that if nothing more had occurred than the driving the party off the land, and what might naturally be expected to happen in doing that, the gun would not have been used in such a manner as to make the person using it guilty of murder, and as I said in regard to the first part of the question, we are bound, where there is a reasonable doubt, to give the accused the benefit of it.”

Since S. 149 deals with constructive liability, it must be construed very strictly. As pointed out in 29 ALL. 282⁵:

“A person may join an unlawful assembly with an unlawful object, but it does not necessarily follow that he indorses all that the other members say or do. Nor is he, therefore, responsible for their acts of which he was not clearly cognizant. For example, two persons may be induced by another to assist him in thrashing his enemy with whom he had had a quarrel. They may consent to lend him their assistance so far, but if he had secretly planned to kill him and does so, they cannot be held responsible for his act.”

In view of the principle above enunciated, I hold that the appellants other than Dalel cannot be held liable for the murder of Hira Singh under S. 302 read with S. 149, Penal Code. The learned counsel for the Crown quoted A. I. R. 1925 Lah. 371.⁶ In this case the appellants formed members of a gang got together for the commission of dacoities and their object in the present case was to abduct Mt. Lajwanti and her sister and to take them to Lyallpur district and sell them there. The deceased was Mt. Lajwanti's lover who was present with her on the occasion of the visit of the offenders to her residence to perpetrate the offence. The

story for the prosecution was that the two girls and their mother, Mt. Radhi, escaped from their house owing to the resistance offered by Jagat Singh, and that they were pursued to the house of some Chamars, which was at a distance of some 40 yards where a marriage party had assembled on the night in question. The offenders were said to have asked the Chamars to hand over their women to them but the Chamars said that they had not come there. It was remarked by the learned Judges that

“when a number of persons set out to abduct women and some of them were armed with pistols the obvious inference to be drawn is that the pistols were intended to be used, if necessary, to overcome any resistance that might be offered. The members of the gang would, therefore, know that murder was very likely to be committed and in any case, having regard to the evidence here, Jagat Singh was clearly shot in prosecution of the common object of all the members of the gang.”

The other case referred to is A. I. R. 1924 ALL. 670.⁷ In this case the accused formed an unlawful assembly whose common object was to carry off by force Mt. Bibbo. Mt. Bibbo was the widow of a brother of accused 1, Behari. Behari and the remaining accused went in a body at night to the house of Jhamman in order forcibly to carry away Mt. Bibbo. Two of the party carried spears and the remainder were armed with *lathis*. About midnight they broke into the house and found Daya Ram, Jhamman, Mt. Bibbo and Jhamman's mother sleeping in the courtyard. They attacked the inmates of the house with *lathis* and Noni struck Mt. Bibbo in the abdomen with a spear. The spear penetrated the liver and intestines and Mt. Bibbo died as the result of the injury. Jhamman and Daya Ram received minor injuries. It was held that in the present case the common object was to carry off Mt. Bibbo alive and her death cannot be said to have been caused in prosecution of the common object. It may indeed be that the party were determined to get her and were prepared to commit murder rather than be balked of their object, but it is not safe to assume that they meant to go so far. The conviction of the accused other than Noni who had struck Mt. Bibbo in the abdomen with a spear was altered to S. 326 read with S. 149, Penal Code. Boys J. in this case observed :

“There can be no question but that ordinarily if accused persons go armed with spears in superior force intending to carry out by force a purpose which they know others will resist, each of the

5. (07) 29 All. 282, Emperor v. Bhola Singh.

6. (25) 12 A. I. R. 1925 Lah. 371 : 86 I. C. 347, Mansha Singh v. Emperor.

7. (24) 11 A. I. R. 1924 All. 670 : 83 I. C. 714, Behari v. Emperor.

accused must be taken to have known, at least, that a death caused by one of his party was likely to be caused."

The third case referred to is 60 I. C. 679.⁸ In this case fifty persons were tried, thirteen of whom were acquitted and thirty-seven were convicted. The *taluqdar's* people went to the Thakur's fields and cut down a *bajra* crop. It was just after this that the riot took place. In the course of the judgment it was held:

"As regards the other accused it would be impossible to say that any possible acts of violence directed against any particular person had been proved as against them. Their liability arises out of the fact that they were members of an unlawful assembly inspired by a common intention and we think that the common intention to be imputed to them, in the circumstances, was that indicated by the learned Judge of the Court below, namely, to give the Thakurs a severe beating. They were armed with *lathis* and consequently we may find as against them that the common intention was to cause grievous hurt. They must be taken to have known that at least they were likely to cause grievous hurt by using *lathis*."

They were convicted under S. 325 read with S. 149, Penal Code. The last case referred to is A. I. R. 1936 Pat. 481.⁹ It was held that the question whether a member of the assembly is guilty necessarily of the same offence as the principal offender or whether it is to be determined with reference to the facts of the case, what offence the members must have known to be likely to be committed and, whether, if such offence, is a minor offence, they should be convicted accordingly, the latter construction appears to be more in accordance with the intention of the Legislature on a reading of the words of the section. This case was decided in accordance with the principles laid down in 20 W. R. Cr. 5⁴ referred to above. On a perusal of these cases it would appear that the facts were clearly distinguishable from those in the present case. The members of the unlawful assembly had clearly prepared a concerted plan and their common object from the start was either to kill the other party, if necessary, in order to achieve their object or, at least, looking to the circumstances of each case, they were considered to have had the intention of causing grievous injuries. The present case is one where, as has been held above, everything happened suddenly and the common object of the members of the unlawful assembly was no more than to give a mild beating to the other party on

the ground that they had no right to object to the singing of songs by the appellants.

It was further urged that the other appellants must be presumed to know that grievous hurt would be the least consequence and they would in any case be liable to be punished under S. 326, Penal Code. I for one cannot appreciate this argument. If at the outset it was known that a member of the unlawful assembly had a firearm it must be presumed that death will be the likely result of its use and the other members cannot escape their responsibility for the death if caused, within the meaning of S. 149. They cannot be heard to say that their liability cannot go beyond their knowledge of grievous hurt under S. 326 because a firearm is more likely to cause death which it actually did in this case than mere grievous hurt. If S. 149 applies, it must apply with its full force and the other members would be as much guilty of murder as the one who had used the firearm with the fatal result. The case, however, would be different where the unlawful assembly is armed with *lathis* or spears and the common object of beating being known, the other members may be presumed to have the knowledge that grievous hurt would at least result even where death is actually caused by one. All these cases proceed on their own facts. In a large number of cases where in the case of death by one the others were held guilty only of grievous hurt the common object was found or held not to be other than to cause grievous hurt with the weapons in their possession. But the cases where members of an unlawful assembly deliberately agree on a common object to be attained at all costs must be distinguished from those where there was no concerted plan and on the spur of the moment the persons who were erstwhile quite peaceful are suddenly transformed into a riotous mob. The common object in this case cannot be said to be the extreme act of one which was wholly unknown or unthought of. I would, therefore, hold that the common object in this case was none other than to give a mild beating to the other party and the moment the first blow was given the offence of rioting under S. 146, Penal Code, was complete. The actual use of force and not merely a show of force is necessary and the force must be in prosecution of the common object. Where, therefore, more injuries than one are caused by the members of the unlawful assembly they can be convicted of offences both under S. 147 and S. 323 read with S. 149, Penal Code.

8. (20) 7 A. I. R. 1920 Oudh 152 : 60 I. C. 679, Barkansingh v. Emperor.

9. (36) 23 A. I. R. 1936 Pat. 481 : 162 I. C. 563, Bhagwat Singh v. Emperor.

Beyond the first injury, the subsequent injuries though inflicted in pursuance of the same common object would be distinct injuries justifying a conviction under S. 323, Penal Code: A. I. R. 1926 ALL. 225.¹⁰ But, if no injury other than a simple hurt was caused a separate sentence may not be necessary and a punishment under the more serious offence of rioting would suffice. The offence under S. 147, Penal Code, however, would be aggravated where the members of the unlawful assembly are armed with deadly weapons. In the present case, since two of the members were armed with *lathis* and one with a knife and another with a pistol which used as weapons of offence are likely to cause death all are guilty under S. 148, Penal Code. Dalel in addition caused the death of Hira Singh with his pistol shot and is, therefore, guilty of murder under S. 302, Penal Code.

Now, as to the sentences, Maha Singh is 21 and Daryao Singh 16 and no previous conviction is proved against any of them and but for the fact that they were members of the unlawful assembly they would have been punishable under S. 323, Penal Code, only. They are young boys, and have been in jail for about 5½ months—a period which might otherwise have been considered adequate punishment—it is no use keeping them in jail any longer. I give them the benefit of S. 562, Criminal P. C., and direct that Maha Singh and Daryao Singh appellants be released on entering into a bond of Rs. 500 each with two sureties to appear and receive sentence when called upon during one year from the date of this order and in the meantime to keep the peace and be of good behaviour. Hukam is a young man of 26 with bad antecedents. He is convicted under S. 148, Penal Code, only but in his case instead of a sentence of 2 years' rigorous imprisonment a sentence of 18 months' rigorous imprisonment shall be substituted. As to Dalel who is a young boy of 19 he is convicted under S. 148, Penal Code, and sentenced to 18 months' rigorous imprisonment and as to his conviction under S. 302, Penal Code, in view of his young age, the loss of temper in the heat of the moment, the sudden and trivial origin of the fight, the absence of any premeditation and his anxiety to help his elder brother Maha Singh who too had received an injury, the extreme penalty of law is not considered desirable but is awarded the lesser penalty of trans-

portation for life and a fine of Rs. 50 and in default thereof further rigorous imprisonment of one month. Both the sentences to run concurrently. The sentence of death is not confirmed. The appeals are, therefore, accepted in part as stated above.

Teja Singh J.—I concur with my learned brother in finding that the appellants formed an unlawful assembly with the common object of giving a beating to Hira Singh and others, that they were all armed with lethal weapons and that while Dalel killed Hira Singh by firing a pistol upon him, Maha Singh and Daryao Singh caused simple injuries to Hira Singh's companions. I am also of opinion, like my learned brother, that Dalel's act went much beyond the common object and that, though he was guilty of the offence of murder, the other appellants could not be held liable for it under the first part of S. 149, Penal Code, because murder was neither the common object of the assembly nor was it committed in prosecution of the common object. As regards the question whether the case came within the purview of the second part of S. 149, Penal Code, for the reason that Dalel's companions knew that murder was likely to be committed in prosecution of the common object of the assembly, my answer is also in the negative, because there is no evidence to show that they knew that Dalel was carrying a pistol. Probably the prosecutor did not pay any attention to this part of the case and he did not elicit from the witnesses whether or not Dalel's pistol could be seen by his companions or they were otherwise aware of the fact that he was armed with that weapon. Accordingly I do not consider it necessary to discuss whether Dalel's companions could not have been held constructively liable for the offence of murder, or for any other lesser offence, which they knew was likely to be committed by him in prosecution of the common object of the assembly, if they were cognizant of his carrying a pistol with him. Accordingly I agree in the order proposed by my learned brother.

D.S./D.H. *Order accordingly.*

[Case No. 42.]

A. I. R. (33) 1946 Lahore 229

TEJA SINGH AND MOHD. SHARIF JJ.

Wali Dad and others — Appellants

v.

Emperor.

Criminal Appeal No 438 of 1945, Decided on 12th November 1945, from order of Addl. Sessions Judge, Lyallpur, D/- 26th April 1945.

¹⁰. (26) 13 A. I. R. 1926 All. 225 : 92 I. C. 463, Chhidda v. Emperor.

(a) Criminal P. C. (1898), S. 154 — First information report — Omission of accused's name in, raises doubt as to his identity.

The omission of the name of an accused person in the *rukka* or first information report raises an element of doubt, however slight, about his identity; and if such accused is acquitted by the Sessions Judge, the High Court will not interfere with the order of acquittal. [P 233 C 1]

Cr. P. C. —

('41) Chitaley, S. 154, N. 9, Pt. 6.

('41) Mitra, Page 463, Para. 481.

(b) Penal Code (1860), Ss. 300, 302 and 149 — Concerted attack on deceased — Multiple injuries inflicted — Intention is to kill deceased or at least to inflict injuries sufficient to cause death in ordinary course — Death sentence held appropriate except in case of one accused who was young and under influence of other accused.

Two persons were attacked by a number of persons armed with deadly weapons and were done to death. One of the deceased persons had ten injuries two of which were on the head and in view of the fact that they had fractured the skull, the doctor was of opinion that each one of them was sufficient to cause death in the ordinary course. The other deceased person had as many as 25 injuries spread on all parts of his body. His right ulna bone and two ribs were fractured. Death was due to shock caused by all the injuries collectively :

Held that taking into consideration the concerted attack to which the dead men were subjected and the multiple injuries that were inflicted upon them, there could not be any doubt that the intention of their assailants was to kill them or at least to inflict injuries that were sufficient to cause death in the ordinary course. [P 233 C 1]

Held further that as the offence was premeditated and brutal and there were no extenuating circumstances, the sentence of death under S. 302/149 was appropriate in the case of all the accused except one who being the nephew of the principal accused and very young (20 years old) it could be said that he had acted under the influence of the older members of the party, particularly his uncle and, therefore, his sentence should be commuted to transportation for life. [P 233 C 1, 2]

Penal Code —

('45) Ratanlal, Page 707, Note "cases."

('36) Gour, Page 986, Para. 3286.

M. Sleem, Manzur Qadir, Khushwant Singh and Ali Ahmad Khan Lodhi — for Appellants.

A. G. Maurice and Madan Mohan Lal for Advocate General — for Respondents.

R. B. Pandit, Jowala Pershad and K.R. Kalia — for Complainant.

Teja Singh J.—Haji Mohammad Ishaq and Hans Raj Bali of Chak No. 695/37 G.B., District Lyallpur, were attacked by a number of persons at a short distance from railway station, Jarala on the evening of 19th August 1944, on the road connecting that station with the Chak. After the culprits had left the place, both the injured persons were taken to the *dera* of P. W. Mohammad Hussain at Chak No. 708-45 which is only

three quarters of a mile from the railway station. Ram Bhaj dispenser was sent for from another neighbouring Chak to render first aid but his efforts proved abortive and Haji Mohammad Ishaq succumbed to his injuries at about 2 A. M. Hans Raj Bali was taken to Lyallpur. He died there on the 21st. Mohammad Hussain sent a *rukka* to the police after Haji Mohammad Ishaq's death, on the strength of which the police registered a case and later on challaned the following eight persons: Wali Dad, his son Salabat, Amir, first cousin of Wali Dad, Nura, Amir's son, Sarwar and Nawab, sons of Shad Dad, a brother of Amir, Barkat Ali and Mohammad Hussain. All these men were tried by the learned Additional Sessions Judge, Lyallpur, on charges of rioting while being armed with deadly weapons and murder committed in the prosecution of the common object of the assembly which was to kill Hans Raj and Haji Mohammad Ishaq. Amir, Salabat and Mohammad Hussain were acquitted. The remaining five were convicted under Ss. 148 and 302/149, Penal Code, and were sentenced to three years' rigorous imprisonment each under the first count and to death under the second count. The convicts have preferred a joint appeal and we have also before us a reference by the learned Judge of the Court below for the confirmation of the death sentence. In addition, there is an appeal by the Crown against the acquittal of Amir, Salabat and Mohammad Hussain. This order will dispose of both the appeals as well as the reference.

Barkat Ali and Mohammad Hussain are not related to the other accused. In fact, they even do not belong to their tribe. Barkat Ali is an Arain and Mohammad Hussain is a Qureshi while Wali Dad is a Sargana. The dead men were not the original residents of the Chak and were literate grantees i.e., lands had been granted to them by the Government because of their educational qualifications. It appears that some sort of ill-will had grown up between Mohammad Ishaq and Wali Dad's family and the prosecution maintains that two days before the occurrence i.e., on 17th August, Wali Dad's cattle which were in the charge of his nephew Sarwar appellant, trespassed into Mohammad Ishaq's field and on this Sarwar was given a beating and the cattle were rounded up with a view to be taken to the cattle-pound. This incident took place in the morning. In the evening between 6 and 7 o'clock Wali Dad accompanied by

some other persons including Chaudhri Shah Din (P.W. 5) went to Mohammad Ishaq's house and asked him to release his cattle. In the course of conversation Wali Dad made a disparaging remark about Mohammad Ishaq. The latter lost his temper and started abusing Wali Dad. He further told him that had he not been in his house he would have taught him a lesson for insulting him. The persons present intervened and prevented the matter from culminating into a fight. Eventually Wali Dad's cattle were released and he took them away, but it was evident that he was feeling very sour. The prosecution story in brief is that because of this grudge Wali Dad collected the other accused and the party waylaid Haji Mohammad Ishaq and Hans Raj on the following day, while they were on their way from the railway station to the Chak. They were all armed with *lathis* and gave a merciless beating to their victims. The occurrence was witnessed by Mohammad Hussain, Sowaya Khan, Ghulam Nabi, Daulat Khan, Dhanna Singh and Hasta. With the exception of Hasta every one of the persons mentioned above came forward to support the prosecution version and deposed that they were eye-witnesses to the occurrence. Daulat Khan and Dhanna Singh, who also belong to Chak No. 695/37, claim to have identified each one of the accused persons, who, they said, were previously known to them. The other witnesses identified only the five appellants and deposed that they knew them before. With regard to Amir, Salabat and Mohammad Hussain their position was that since they had not seen them before the occurrence they could not say who they were, but they identified them later on in two parades that were held for the purpose. The first parade was held on 7th September 1944 under the supervision of R. S. Amolak Ram, Honorary Magistrate. It was for the identification of Salabat and Amir who were mixed with twelve other under-trial prisoners. The second parade was held on 14th September 1944 by Rao Sultan Singh, Magistrate 1st Class, for the identification of Mohammad Hussain. On both the occasions, Ghulam Nabi, Sowaya Khan and Mohammad Hussain witnesses picked out the accused in question and stated that they were among the eight persons who assaulted Haji Mohammad Ishaq and Hans Raj. Mohammad Hussain's evidence was that he was working in his field quite close to the place of occurrence and was trying to drain therefrom the rain water that had

collected therein, when he heard the noise and went running to the spot. There he saw eight men belabouring the dead men. Sowaya Khan deposed that he was going towards his square and when he reached the *rajbaha* he saw eight men sitting under the shade. This was before the arrival of the train. He then went to his field and got busy in cutting fodder. Sometime later, and a short time after the train had arrived he went to look after his buffalo. It was then that he heard a noise and saw the occurrence. Ghulam Nabi, Daulat Khan and Dhanna Singh had gone to Shorkot and had returned to Jarala by the same train by which the dead men had arrived. The dead men went ahead of all. Ghulam Nabi followed them at some distance. Dhanna Singh and Daulat Khan were behind him.

Mr. Sleem, learned counsel for the appellants, frankly admitted before us that the defence had not been able to bring out anything against the eye-witnesses and evidently there was no reason to think that they had any motive to give false evidence. Apart from this, we have the testimony of Shahdin, Basant Singh and Fateh Din who deposed to the incident of 17th August which was alleged to be the motive for the crime. Shah Din was a graduate and the other two were also educated persons. They all stated that the quarrel to which they deposed took place on 17th. Wali Dad admitted the incident but said that it took place on the 18th. His learned counsel drew our attention to Ex. P.-G., the report made by Wali Dad at the police station on 19th at 4 P.M. in which it was stated that Wali Dad's cattle had been rounded up and Ghulam Sarwar had been given a beating "yesterday morning." I am of the opinion that Wali Dad made this report with a view to create evidence of alibi and he deliberately gave the wrong date, because if he had admitted that the incident took place on 17th he would have been faced with the difficult position of explaining the delay. To this aspect of the case I shall return hereafter. It is significant that none of the three witnesses who stated that the rounding up of the cattle and the quarrel that arose thereon took place on 17th August was questioned about the date, and since they are all educated persons I must accept their statements on this point as true. What Mr. Sleem argued before us was that the prosecution version was highly improbable and unnatural. He also tried to convince us that the dead men had other enemies in the village, that someone of them

had killed them and that the accused party had been involved because of previous enmity. He argued that it was a strange coincidence that out of the five witnesses who claim to have been present at the time the offence was committed three were able to identify the same five persons. He also argued that Mohammad Hussain's failure to mention the names of Daulat Khan and Dhanna Singh among the eye-witnesses in the report that he sent to the police station shows, (1) that Daulat Khan and Dhanna Singh were not there at all, and (2) that Mohammad Hussain was not a reliable witness. Mohammad Hussain's explanation for the omission of the names of these two persons is that from a remark that they made to him when he complained to them that their village people had been guilty of a brutal crime, he came to think that they were not likely to give true evidence and accordingly he deliberately refrained from making any mention of them. I agree with Mr. Sleem that Mohammad Hussain's explanation is not very reasonable and convincing, but I cannot hold that it must necessarily be false. The evidence is that though Daulat Khan and Dhanna Singh had seen two men of their village being brutally assaulted they did not stop there and went away at once. Whether or not Mohammad Hussain had any talk with them, this conduct of Daulat Khan and Dhanna Singh was sufficient by itself to make Mohammad Hussain think that they did not want to be dragged in the case as eye-witnesses and the safest thing was to make no reference to them in the report. I do not say that he was right in acting as he did, but at the same time I am not prepared to hold that his entire evidence should be disregarded for this reason alone. Then, even if it be assumed for the sake of argument that Mohammad Hussain was not a reliable witness, nothing whatsoever has been alleged against the other witnesses particularly Sowaya Khan and Ghulam Nabi.

It was also argued by Mr. Sleem that if Mohammad Hussain did not know three of the assailants he could have made enquiries about them from Daulat Khan and Dhanna Singh or at least from Mohammad Ishaq deceased, because the evidence is that he retained his consciousness for some time. The simple explanation for Mohammad Hussain's failure to do this was that not being in any way connected with the dead men he had absolutely no interest in the matter and he did not think of sending any report to the

police station before Mohammad Ishaq died. In any case, this can create a doubt regarding the identity of the accused acquitted by the learned Sessions Judge but not about the persons who were previously known to Mohammad Hussain, Sowaya Khan and Ghulam Nabi and whom they claim to have recognised on the spot. It is admitted that Mohammad Ishaq died at Mohammad Hussain's *dera* and Ram Bhaj supported the evidence that he was sent for to render what little help he could to the injured persons. Arguments were also addressed to us regarding the alleged delay in making the report, but I do not think there is any force in it. In view of the hopeless condition in which the dead men were at the time they were conveyed by Mohammad Hussain to his *dera* it is not surprising that his first impulse was to attend upon them and to save them if he could. It was with this object that he called in Ram Bhaj and he thought of the first information report after Mohammad Ishaq had died. My opinion is that Mohammad Hussain would never have bothered himself with the report had it not been for the fact that it was in his *dera* that Mohammad Ishaq breathed his last. A word now about the defence evidence. (Here their Lordships discussed the defence evidence and proceeded as follows.)

After having shown that the prosecution version was substantially correct and there was no reason to doubt the truth of the eye witnesses' testimony, particularly that of Mohammad Hussain, Sowaya Khan and Ghulam Nabi, the question now to be decided is whether the learned Sessions Judge was right in convicting five persons and in acquitting the remaining three. I am convinced that Wali Dad, Sarwar, Nawab, Nura and Barkat Ali were known to the eye witnesses and they could have had no difficulty in recognising them. It was stressed by Mr. Sleem that in cases of this kind there is always a tendency on the part of the complainant party to implicate all members of their enemy's family and has argued that since in the present case the Sargana accused consisted of the entire body of adult sons and nephews of Wali Dad, this was also a case of that kind. This contention is not absolutely correct, because Amir has another brother Shah Dad and his age being 60 to 65, it cannot be said that he was left out because he was not fit enough to take part in a fight. Then, it must be remembered that in the report originally made by Mohammad Hussain, Salabat, the only adult son of

Wali Dad, and Amir were not mentioned at all. We know that Mohammad Ishaq's wife had arrived before Mohammad Hussain sent his *rukka* to the police and if Mohammad Hussain had any sinister motive in making the report or he was determined to rope in every one of Wali Dad's family, surely he would have consulted Mohammad Ishaq's wife and she could have very easily given him information about Salabat, Amir and Shah Dad. Then if the intention was to take revenge upon Wali Dad's family, why should Barkat Ali have been roped in? He was not in any way related to Wali Dad and it is not even alleged that he had annoyed the complainant party or the eye-witnesses in any way. I am, therefore, convinced that the case against Wali Dad, Sarwar, Nawab, Nura and Barkat Ali was proved beyond any reasonable doubt. Different, however, is the case so far as Salabat, Amir and Mohammad Hussain are concerned. It is true that Mohammad Hussain stated in his *rukka* to the police that the culprits were eight in number and it is probable that Salabat and Amir at least were amongst them. The omission of their names in the *rukka* raises an element of doubt, howsoever slight about their identity. I am, therefore, of opinion that we should not interfere with the order of the learned Sessions Judge acquitting them.

The only other questions that remain to be considered are the nature of the offence and the appropriate sentence. As regards the former, no detailed discussion is called for. According to the medical evidence, Hans Raj had ten injuries two of which were on the head and in view of the fact that they had fractured the skull, the doctor was of opinion that each one of them was sufficient to cause death in the ordinary course. Mohammad Ishaq had as many as twenty five injuries spread on all parts of his body. His right ulna bone and two ribs were fractured. Death was due to shock caused by all the injuries collectively. Taking into consideration the concerted attack to which the dead men were subjected and the multiple injuries that were inflicted upon them, there cannot be any doubt that the intention of their assailants was to kill them or at least to inflict injuries that were sufficient to cause death in the ordinary course. Nor do I think much need be said regarding the sentence. The offence was premeditated and brutal. There were no extenuating circumstances. I believe that Wali Dad was at the bottom of the whole

trouble but no leniency can be shown to Sarwar, Nawab and Barkat Ali either, who were all grown up persons and were expected to know the consequences of their act. The only person whose case deserves some consideration is Nura. He is the youngest of the whole lot. He gave his age as twenty years. The doctor who medically examined him stated that he might be twenty-four years old, but he admitted the possibility of his being less. Being the nephew of Wali Dad and very young it can be said that he acted under the influence of the older members of the party, particularly Wali Dad. In the result, I would dismiss the Crown appeal as also the appeal by Wali Dad, Sarwar, Nawab and Barkat Ali. Their sentences of death are confirmed. I would accept Nura's appeal to the extent that I would commute the sentence awarded to him under S. 302/149, Penal Code, from death to transportation for life. His sentence of death is not confirmed. I would further direct that the sentence awarded to Nura under S. 148, Penal Code, should run concurrently with the other sentence.

V.R./D.H.

Order accordingly.

[Case No. 43.]

**** A. I. R. (33) 1946 Lahore 233**

FULL BENCH

ABDUL RASHID, RAM LALL AND
MAHAJAN JJ.

Iftkhar Hussain Khan — Defendant
— Appellant

v.

Beant Singh minor through his maternal uncle Prabh Dyal—Plaintiff—Respondent.

Second Appeals Nos 562 and 563 of 1943. Decided on 14th January 1946, reference made by Abdul Rashid, Ag. C. J. and Achhru Ram J., D/- 10th October 1945.

**** (a) Minor — Decree passed against — Minor can avoid it, on ground of gross negligence of guardian *ad litem* even in absence of proof of fraud or collusion.**

A minor can avoid a decree passed against him on the ground of gross negligence on the part of his guardian *ad litem*, even if he has not succeeded in proving fraud or collusion on the part of such guardian : ('39) 26 A. I. R. 1939 Bom. 66 (F. B.), *Dissent.*; ('42) 29 A. I. R. 1942 Lah. 205, *held not correctly decided; Case law discussed.*

[P 234 C 1; P 242 C 1]

(b) Civil P. C. (1908), S. 147—S. 147 does not place consent decrees obtained against minors on higher footing than decrees obtained after contest—Consent decree against minor can be avoided in same manner as contested decrees in spite of S. 147.

Section 147 was enacted to place consent decrees against the minors on the same footing as decrees passed after contest. If decrees passed after contest can be avoided by the minors on account of fraud, collusion or gross negligence of their guardians *ad litem* there is no reason to suppose that consent decrees obtained against the minors cannot be avoided in the same manner in spite of the provisions of S. 147. Section 147 is meant to prevent a plea, on behalf of the minor, that as the decree against him was a consent decree he was not bound by it even though his guardian was not proved to have acted with fraud or collusion or to have been grossly negligent. [P 237 C 1]

(c) Evidence Act (1872), S. 44—Substantive right of minor to avoid decree obtained against him on account of gross negligence of guardian *ad litem* cannot be defeated merely because gross negligence is not mentioned in S. 44.

The right of the minor to avoid a decree obtained against him on account of the gross negligence of his guardian *ad litem* is a substantive right. It is not a mere matter of procedure and does not depend on any rule of evidence. He cannot be prevented from enforcing his substantive right simply because this may cause loss or inconvenience to the plaintiff of the previous litigation. Apart from the provisions of S. 44, Evidence Act a minor would have the right to avoid a decree obtained against him by means of fraud or collusion. A substantive right cannot be defeated simply because gross negligence is not mentioned as one of the grounds of avoiding a judgment in S. 44, Evidence Act. Section 44 is merely permissive and not prohibitive. It does not enumerate or exhaust the grounds upon which a decree or order may be attacked : ('32) 19 A. I. R. 1932 All. 293 (F. B.) (Majority view), *Rel. on.* [P 239 C 1]

(d) Civil P. C. (1908), S. 11 — Suit by minor to vacate decree obtained against him on account of gross negligence of guardian *ad litem* — S. 11 does not apply.

Section 11 has no application to an action by a minor to have a decree vacated on the ground of gross negligence of his guardian *ad litem*. Under that section, the Court is prevented from trying a suit or an issue which has already been determined, but if the judgment previously determining the suit or the issue is vacated because of the right of the applicant to avoid the judgment on the ground of fraud, collusion or gross negligence, the obstacle contemplated by S. 11 is automatically removed. The option of avoiding the judgment when exercised vacates the judgment itself. This option accrues after the judgment has been delivered and the judgment is good so long as it stands.

[P 243 C 1]

Mohammad Din Jan — for Appellant.

Amar Nath Chona — for Respondent.

Abdul Rashid J.—The following question has been referred to the Full Bench :

"Whether a minor can avoid a decree passed against him on the ground of gross negligence on the part of his guardian *ad litem*, even if he has not succeeded in proving fraud or collusion on the part of such guardian?"

This reference has been necessitated because a Full Bench of the Bombay High Court in I. L. R. (1939) Bom. 340¹ has taken a view

1. ('39) 26 A.I.R. 1939 Bom. 66 : I. L. R. (1939) Bom. 340 : 180 I. C. 51 (F. B.), *Krishan Das Padmanabha Rao v. Vithoba Annappa*.

which is in direct conflict with the opinion of the Allahabad High Court in 54 ALL. 646.² A recent Division Bench judgment of this Court in I. L. R. (1943) Lah. 113³ contains some observations which indicate that the learned Judges approved of the view taken by the Full Bench of the Bombay High Court. It is desirable that this divergence of judicial opinion be set at rest so far as this Court is concerned.

To appreciate the question of law involved in this reference it is necessary shortly to state the facts of the case. Ram Singh maternal uncle of Beant Singh plaintiff executed a *qabuliatnama* in favour of Nawab Sir Muhammad Shah Nawaz Khan of Mamdot on 2nd October 1933. Ram Singh purported to execute this *qabuliatnama* on behalf of his nephew Beant Singh and one Mohindar Singh son of Fateh Singh, both of whom were minors. A certain area of land was taken on lease by Ram Singh by means of this document for the minors. It was stated that the minors would cultivate the land as tenants under the Nawab and would pay rent at a specified rate. If the rent was not paid by the minors Ram Singh would be personally liable for the payment of the rent due from the minor tenants. On account of the failure in payment of rent the Nawab instituted two suits against the two minors and Ram Singh. One for the recovery of a sum of Rs. 1070 and the other for Rs. 757. Ram Singh was named as a guardian *ad litem* of the two minors in the plaints. He, however, refused to act. Notices were then sent to the mothers of the minors who refused to appear and defend the suits. In these circumstances the Reader of the Court was appointed a guardian *ad litem*. It was contended on behalf of the minors that they had never occupied the land as tenants under the plaintiff. This plea was overruled by the Assistant Collector who tried the suits. Eventually both the suits were dismissed against Ram Singh but were decreed against the minors. An appeal was filed on behalf of Mohindar Singh in the Court of the Collector. The Collector held that Mohindar Singh had never become a tenant of the lands mentioned in the *qabuliatnama* and was not liable for the arrears of rent claimed against him. The decrees passed by the Assistant Collector

2. ('32) 19 A.I.R. 1932 All. 293 : 54 All. 646 : 139 I.C. 465 (F.B.), *Siraj Fatma v. Mahmud Ali*.

3. ('42) 29 A.I.R. 1942 Lah. 205 : I. L. R. (1943) 24 Lah. 113 : 201 I. C. 671, *Mt. Kanta Devi v. Mt. Kalawati*.

were set aside so far as Mohindar Singh was concerned. No appeals had been filed on behalf of Beant Singh.

The suits, which have given rise to the present reference, were instituted by Beant Singh, who is still a minor, through his maternal grandfather Bachittar Singh. In these suits a declaration was prayed for by Beant Singh to the effect that the decrees passed against him by the Revenue Court were not binding as no guardian had been properly appointed to act on his behalf in the Revenue Court, and in any case the guardian was guilty of fraud, negligence and bad faith. The trial Court held that the Reader of the Court had been properly appointed as a guardian in the revenue suits. The guardian was, however, held to be guilty of gross negligence in not lodging appeals against the orders of the Assistant Collector so far as Beant Singh was concerned. It was further held by the trial Court that Ram Singh had no authority to bind the minor Beant Singh by a contract of tenancy, that the contract of tenancy was not for the benefit of the minor, that the minor had already a considerable area of land in his possession which he had inherited from his father and, therefore, did not stand in need of taking any land on lease, that being a minor he could not be expected to arrange for the cultivation of such an extensive area, and that if the matter had been taken in appeal to the learned Collector it was very likely that Beant Singh would have been exonerated from all liability under the lease exactly in the same way as Mohindar Singh. On appeal the learned District Judge upheld the findings of the trial Court on the question of gross negligence of the guardian of Beant Singh and affirmed the decrees passed by the trial Court in favour of the minor. The defendant has accordingly preferred two second appeals against the two decrees of the learned District Judge in favour of the plaintiff.

There are a large number of cases containing observations for and against the view that negligence of a guardian of a minor is a good ground for avoiding the decree. So far as the Punjab Chief Court and this Court are concerned, it appears to me that up to the year 1943 it was uniformly held that the minor is entitled to avoid a decree, which had been obtained against him, if it is established that his guardian *ad litem* was grossly negligent in protecting his interests in the previous litigation. It was held by a Division Bench consisting of

Chatterji and Gordon-Walker JJ. in 35 P.R. 1898⁴ that the omission by the guardian to appeal on behalf of a minor from a decree obtained against him, notwithstanding that there were excellent grounds, both on law and in the facts, for an appeal, amounted to gross negligence on the part of the guardian and that under such circumstances it would be contrary to law and equity to hold that the minor was bound by the former decree. It was observed that the position of a guardian *ad litem* of a minor was that of a trustee. The guardian is bound strictly to act in the interests of the minor, and he has not the liberty, as long as he retains his position, of abandoning the case as he would have were it his own, unless such abandonment is clearly in the interests of the minor. The learned Judges relied on 22 Cal. 8⁵ and on (1874) 18 Eq. 573.⁶ They pointed out that the right of the minor to avoid a decree that has been obtained as a result of the gross negligence of his guardian was a substantive right and that on attaining majority the minor could bring a fresh suit to avoid such a decree obtained against him. Reference was also made to various passages in Simpson on Infants and on the work of Trevelyan J. on the Law relating to Minors. The next case is that of 4 P. L. R. 1901.⁷ In that case the plaintiff Mangal had sued a minor defendant under the guardianship of his mother. No order constituting her as guardian was passed by the Court. She filed a written statement but did not enter appearance afterwards and the case was decreed *ex parte*. An appeal preferred by a person said to be a relation of the defendant was rejected. The minor then brought a suit to set aside the decree and it was held that the minor defendant was not bound by the decree passed against him for he was not properly represented in the previous suit. It was observed that the plaintiff's mother, who was his guardian in the previous litigation, had remarried and did not duly defend the minor after the first hearing. In these circumstances she was grossly negligent and the minor was, therefore, entitled to avoid the decree obtained against him in the previous litigation. Reliance was again placed on the case

4. ('98) 35 P. R. 1898, Ahmad Ali Shah v. Amir Shah.

5. ('95) 22 Cal. 8, Lala Sheo Charan Lal v. Ram Nandan Dobey.

6. (1874) 18 Eq. 573 : 43 L. J. Ch. 758 : 22 W.R. 854, Houghton v. Fiddey.

7. ('01) 4 P. L. R. 1901, Mangal v. Buta.

in 22 Cal. 8.⁸ In 15 P.L.R. 1912⁹ it was held that negligence on the part of a guardian *ad litem*, even apart from fraud or collusion, was sufficient to prevent the *quondam* minor from being bound by the decree passed in the previous suit, 35 P. R. 1898⁴ was followed by Chevis J. in this case. In 103 P. R. 1917⁹ it was observed that as the guardian of the minor was negligent the previous decision against the minor did not operate as *res judicata* in subsequent litigation. In the circumstances of that particular case, however, it was found that the plaintiff's mother had not been guilty of negligence in not appealing from the decision of the trial Court in the previous litigation, as at the time the status of an after-born son to challenge an alienation by his father prior to his birth was not recognized. This decision was given by Scott-Smith and Leslie Jones JJ. Scott-Smith J., however, struck a discordant note in 1 Lah. 27.¹⁰ It was held by the learned Judge that where a decree has been made against a minor, duly represented by his guardian, and the minor on attaining majority seeks to set aside that decree by a separate suit he can succeed only on proof of fraud or collusion on the part of his guardian. If the guardian neglected to support the case of the minor and there was nothing to show that he did so deliberately that circumstance alone would not entitle the minor to avoid the operation of the decree. Scott-Smith J. relied on 12 Cal. 69¹¹ and no reference was made to the previous cases decided by the Punjab Chief Court. It appears that the same learned Judge took a different view a few years later in A. I. R. 1925 Lah. 116.¹² It was held by Scott-Smith J. that mere failure on the part of the guardian *ad litem* to defend a suit or to appeal from a decree is of itself not gross negligence since it is possible that there may be a good case against the minor and the guardian *ad litem* might have thought fit not to incur additional expense in defending the suit.

He, however, observed that if the guardian is grossly negligent it would be open to the minor to avoid the decree on that

ground. In A. I. R. 1928 Lah. 674,¹³ Zafar Ali J. held that where the guardian *ad litem* of the minor against whom a decree is passed has been guilty of gross negligence and laches in conducting the suit on behalf of the minor the decree so passed can be set aside. No reliance was placed in this judgment on the decision of Scott-Smith J., reported in 1 Lah. 27.¹⁰ It was pointed out by Zafar Ali J. that the same learned Judge had taken a different view in the year 1925. In A.I.R. 1935 Lah. 349¹⁴ it was held by Agha Haidar J., that so far as the minors are concerned, fraud and negligence stand on the same footing and a minor is not bound by a decree passed against him in a suit where his guardian had showed gross negligence by not setting up a good defence of which he must have been aware. It was held by Din Mohammad J. in A.I.R. 1940 Lah. 205¹⁵ that in a suit by the minor assailing a decree obtained against him if gross negligence of his guardian, who conducted the case in which the decree was passed, is proved the decree must be set aside. Reliance was placed before the learned Judge on the Full Bench ruling of the Bombay High Court in I.L.R. (1939) Bom. 340.¹ The learned Judge, however, was not convinced of the soundness of the reasoning advanced by the learned Judges of the Bombay High Court and held that, as the trend of authority throughout India was to set aside the decrees obtained against minors if gross negligence of their guardians was proved he was not prepared to follow the Bombay ruling.

Having examined all the decisions on the question involved in this reference from the year 1898 to 1943, I now proceed to consider in some detail the judgment of a Division Bench of this Court in I.L.R. (1943) Lah. 113⁹ as this decision contains some observations which indicate that the learned Judges approved of the view of the Bombay High Court in preference to the opinion of the Allahabad Court. It was held by the learned Judges that the negligence of a guardian *ad litem* was not itself a ground for setting aside a consent decree against a minor which can only be set aside on the ground of fraud actual or constructive. The case in 54 ALL. 646³ was referred to in support of the proposition that the negligence of a guardian *ad litem* is sufficient ground for

8. ('12) 15 P. L. R. 1912: 13 I.C. 20, Mohammad v. Sukha Singh.

9. ('18) 5 A.I.R. 1918 Lah. 223 : 103 P. R. 1917: 43 I.C. 354, Ismail v. Mt. Sultan Bibi.

10. ('20) 7 A. I. R. 1920 Lah. 417 : 1 Lah. 27: 55 I.C. 833, Imam Din v. Puran Chand.

11. ('86) 12 Cal. 69, Raghubar Dayal Sahu v. Bhikya Lal.

12. ('25) 12 A.I.R. 1925 Lah. 116 : 82 I.C. 598 : Nawab Singh v. Gurbakhsh Singh.

13. ('28) 15 A. I. R. 1928 Lah. 674 : 108 I.C. 63, Fazal Din v. Muhammad Shafi.

14. ('35) 22 A.I.R. 1935 Lah. 349 : 156 I.C. 818, Bhagat Ram v. Buta Singh.

15. ('40) 27 A.I.R. 1940 Lah. 205 : 190 I.C. 648, Punnun Mal v. Bishambar Dayal.

setting aside a decree. The learned Judges however observed that in the case before them the scope of the question was definitely limited by the fact that there were statutory provisions which controlled the operation of compromise decrees in which minors were concerned. They then proceeded to consider the provisions of O. 32, R. 7 and S. 147 of the Code and laid down that S. 147 would appear to make it clear that a minor stands on the same footing as an adult when a compromise has been effected on his behalf with the express leave of the Court, and since an adult cannot seek to avoid a decree on the bare ground of negligence in his agent, a minor cannot claim a better footing. The learned Judges were greatly impressed by the provisions of S. 147, Civil P. C. and stated that in all the reported cases in which the gross negligence of the guardian had been regarded as a sufficient ground for the avoidance of the decree by the minor, the effect of S. 147 had not been considered. They distinguished a number of other cases on the ground that gross negligence in those cases amounted to fraud or collusion. Section 147 of the Code is in the following terms :

"In all suits to which any person under disability is a party, any consent or agreement, as to any proceeding shall, if given or made with the express leave of the Court by the next friend or guardian for the suit, have the same force and effect as if such person, were under no disability and had given such consent or made such agreement."

It appears to me that this section was enacted to place consent decrees against the minors on the same footing as decrees passed after contest. If decrees passed after contest can be avoided by the minors on account of fraud, collusion or gross negligence of their guardians, there is no reason to suppose that consent decrees obtained against the minors cannot be avoided in the same manner in spite of the provisions of S. 147, Civil P. C. In my opinion, S. 147 does not place consent decrees obtained against the minors on any higher footing than decrees obtained against the minors after contest. This section is meant to prevent a plea, on behalf of the minor, that as the decree against him was a consent decree he was not bound by it even though his guardian was not proved to have acted with fraud or collusion or to have been grossly negligent. With all respect it appears to me that 54 ALL. 646² has been distinguished on grounds which cannot bear examination. In the Allahabad case the alleged negligence of the guardian consisted in the omission of the

guardian to file a civil suit as directed by a Revenue Court. It was observed that the Allahabad case did not relate to a compromise decree and that when the express leave of the Court was obtained for a compromise on behalf of a minor, it seems hardly likely that leave would be given unless the minor was properly represented; and while the possibility should not perhaps be entirely excluded, it seemed extremely remote. In making this observation the learned Judges completely lost sight of the fact that it is the substantive right of a minor to avoid a decree obtained against him owing to the gross negligence of his guardian. In England, as I will show later on, it is a well established rule of common law that the minor can avoid a decree if it has been obtained on account of gross negligence of the guardian. The procedure in England may be different from the procedure employed for the purpose in India. But it is recognized in both countries that the right of a minor to avoid a decree is a substantive right. This substantive right cannot be taken away by the mere fact that in certain procedural matters the provisions of S. 147 and O. 32, R. 7, Civil P. C., have to be complied with. Even though the learned Judges in I. L. R. (1943) Lah. 113³ definitely limited the scope of their observations to consent decrees it appears to me, with all respect, that this case was not correctly decided. The previous decisions of this Court dealing with the avoidance of decrees obtained against the minors on account of the gross negligence of their guardians were not considered and consent decrees were wrongly placed on a much higher footing than decrees in contested suits. From the year 1898 to the year 1943, all the decisions of this Court were to the effect that it was open to the minor in a subsequent suit to avoid the decree obtained against him in previous litigation if he could show that the prior decree had been obtained against him owing to the gross negligence on the part of his guardian. In one case Scott-Smith J. had taken a different view, but he had changed his opinion a few years afterwards. The previous decisions from 1893 to 1943 required careful examination if they were to be departed from even in the case of consent decrees.

As far as the Allahabad High Court is concerned only three cases need consideration. It was held in 38 ALL. 452¹⁶ that a decree obtained against an infant properly

16. (16) 3 A.I.R. 1916 All 324 : 38 All. 452 : 35 I. C. 63, Beni Prasad v. Lajja Ram.

made a party and properly represented in the case cannot be set aside by means of a separate suit except upon proof of fraud or collusion on the part of the guardian. Reliance was placed in this judgment on the case in 12 Cal. 69.¹¹ This judgment contains no independent reasoning and merely follows the decision of the Calcutta Court. This decision of the Calcutta Court has not been followed in subsequent decisions of that Court. The attention of the learned Judges does not appear to have been invited to 22 Cal. 8,⁵ which is the leading case of the Calcutta Court and which takes a different view. It was held in 48 ALL. 44¹⁷ that gross negligence, which may be interpreted as culpable neglect of the interests of a minor defendant, on the part of his guardian *ad litem* will entitle the minor to the avoidance of proceedings undertaken against him. It must be such negligence as leads to the loss of a right which, if the suit had been resisted with due care, must have been successfully asserted. Reliance was placed in this case on 22 Cal. 8⁵ and a number of other decisions of that Court. The previous ruling of the Allahabad High Court, however, does not seem to have been brought to the notice of the Court. The latest and the most important decision of the Allahabad High Court was given by a Full Bench consisting of Sulaiman, Boys and Sen JJ. in 54 ALL. 646.² Owing to the conflict of opinion in the Allahabad High Court indicated above, a reference to the Full Bench was necessitated. It was held by two of the Judges that the right of a minor to avoid a decree passed against him, on the ground of negligence of his guardian *ad litem*, was a substantive right, well recognized in English law, and equally applicable in India as it was not founded upon any peculiarities of the English law but upon the broad principles of justice, equity and good conscience. A suit for the enforcement of such a right of the minor either to ignore or to challenge the propriety of the order passed against him is undoubtedly one of a civil nature and falls within the purview of S. 9, Civil P. C., and the jurisdiction of the civil Court to entertain such a suit exists, unless it has been taken away by a clear legislative enactment. The following observations from the judgment of Sulaiman J. may be reproduced *in extenso*:

"The case of a minor litigant is very peculiar. While the litigation is being fought he is in a helpless position and cannot protect his interests or defend his rights. The Courts have, therefore, a duty

17. ('26) 13 A. I. R. 1926 All. 36 : 48 All. 44 : 90 I. C. 749, Brij Raj v. Ram Sarup.

cast upon them to watch his interests vigilantly and the minor is considered to be under the protection of the Court. The guardian *ad litem* who is appointed to represent the minor has to be appointed by the Court and he must be a proper person to be his guardian for the suit. There is, however, no such formal order in the case of a next friend who sues on behalf of a minor and who is not appointed by the Court. The guardian is bound to take care of the interests of the minor in the same way as a prudent man would look after his own interests. Negligence on his part would be a breach of duty. The test of negligence should be the not doing of what a reasonable man, guided by prudent considerations which regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do. The minor who is not able to resist the claim himself is represented by the duly constituted guardian, who is under an obligation to exercise due care and skill which a prudent man would exercise if he himself were a party. If the guardian appointed is not a proper guardian, for instance, where his interest is adverse to that of the minor or where the guardian is grossly negligent in looking after the interest of the minor, it can hardly be said that the minor is properly represented in the litigation. Even where there was a duly constituted guardian and there was no flaw in his appointment, their Lordships of the Privy Council in *Durgapersad v. Keshopersad Singh*¹⁸ held that as the guardian named in the case was not a legal guardian and had no right to defend the suit on behalf of the minor, the decree was not binding upon him It, therefore, follows that the real basis of the binding character of a decree against a minor is the fact of his having been represented by a proper person, and not the mere existence of any formal order appointing a guardian for him. Even when there is such an order, if the guardian does not properly represent him, the decree would not be binding. On the other hand, even if there be any defect in the formal appointment of a guardian, the decree would be binding upon him if he is sufficiently represented and his interests are well protected."

Boys J. gave a dissenting judgment. He held that to allow evidence of negligence on the part of a guardian as relevant for the purpose of destroying the effect of a decree or judgment would be to act upon a rule of evidence not embodied in the Evidence Act, in any statute or regulation, and which was, therefore, prohibited by S. 2, Evidence Act. Section 44 of that Act made an exception, as it were, to the operation of S. 11, Civil P. C., by allowing evidence to show that a judgment had been obtained by fraud or collusion, but no such exception was made in favour of negligence of the guardian *ad litem*; nor did such negligence stand on the same footing as fraud or collusion. It was an undue straining of the language to say that because a duly appointed guardian *ad litem* was negligent, the minor was not "properly represented." In giving his decision it appears to me that Boys J., did not pay due regard

18. ('82) 8 Cal. 656 : 9 I. A. 27 : 4 Sar. 332 (P.C.).

to the fact that the right of the minor to avoid a decree obtained against him on account of the gross negligence of his guardian was a substantive right. It was not a mere matter of procedure and did not depend on any rule of evidence. Apart from the provisions of S. 44, Evidence Act, a minor would have the right to avoid a decree obtained against him by means of fraud or collusion. A substantive right cannot be defeated simply because gross negligence is not mentioned as one of the grounds of avoiding a judgment in S. 44, Evidence Act. Section 44 is merely permissive and not prohibitive. It does not enumerate or exhaust the grounds upon which a decree or order may be attacked. These matters were duly pointed out in the judgments of Sulaiman J., and Sen J. I am in respectful agreement with the observations of Sulaiman and Sen JJ.

The Patna High Court has uniformly taken the view that it is open to the minor on attaining majority to avoid a decree obtained against him on account of the gross negligence of his guardian. It was held in 6 Pat. 388¹⁹ that a consent decree does not stand on a higher footing than a contract between the parties, and a minor can in a subsequent suit impeach the decree passed in the previous suit on the ground that there was gross negligence on the part of the guardian. It was also held in 14 Pat. 824²⁰ that a minor can avoid a decree passed against him on account of the gross negligence of his guardian. The equitable considerations which enable the Courts to give relief to a minor who has suffered loss on account of the neglect of his guardian, should be extended to a ward of the Court who, for all practical purposes, stands in the same position as a minor. No discordant note seems ever to have been struck in Patna where reliance has always been placed on the case in 22 Cal. 8.⁵

The earlier Bombay cases are to the effect that a minor can avoid a decree obtained against him if his guardian *ad litem* has been grossly negligent. In 19 Bom. 571²¹ it was held that a decree passed against an infant properly represented is binding upon him like a decree passed against an adult,

but it is open to the infant to impeach such decree by a suit in cases where his guardian has been guilty of fraud or negligence in allowing the decree to be passed against him. In 24 Bom. 547²² it was held that it is only where fraud or negligence is proved on the part of the guardian of a minor that the right to bring a suit to set aside the previous decision can be claimed by a minor or his administrator. In 9 Bom. L. R. 1099²³ it was laid down that the mere fact that the decree was obtained *ex parte* does not make it illegal or invalid. It would of course be otherwise if fraud or collusion or gross negligence on the part of the Nazir were proved. To the same effect is 45 Bom. 648.²⁴ Shah J. observed at p. 654 that it is also clear that a minor on attaining majority can sue to have any decree against him set aside on the ground of fraud or negligence on the part of his next friend or guardian. In 40 Bom. L. R. 127,²⁵ it was decided that a minor has a right to avoid a decree which is obtained against him owing to gross negligence of his guardian. A discordant note was, however, struck in the Bombay Court in I. L. R. (1937) Bom. 839.²⁶ The learned Chief Justice held that a minor cannot challenge, in an independent suit, the validity of a decree passed against him on the ground of negligence of his guardian *ad litem*. In the absence of fraud or collusion, if a minor wishes to challenge a decree against him on the mere ground of negligence by his guardian, he must do so in the suit by such means as the rules of procedure provide. Reliance was placed in this case on 12 Cal. 69,¹¹ 38 ALL. 452¹⁶ and 1 Lah. 27.¹⁰ The judgment of the Calcutta High Court in 22 Cal. 8⁵ was disapproved. The earlier cases of the Bombay High Court were not cited before the learned Chief Justice. The following observations from the judgment of the learned Chief Justice may be quoted with advantage :

"In 54 All. 646² Sulaiman J., as he then was, gave an exhaustive and, if I may say so, a very interesting and instructive judgment, in which he reviewed the whole matter. I agree with him that S. 11, Civil P. C., relating to *res judicata* cannot apply when the previous judgment which is alleged to have decided the matter is challenged in the

22. (1900) 24 Bom. 547, Hanmantapa v. Jivu Bai.
23. ('07) 9 Bom. L. R. 1099, Vishnu Narayan v. Dattu Vasudeo.

24. ('21) 8 A. I. R. 1921 Bom. 20 : 45 Bom. 648 : 60 I. C. 919, Sonubai v. Shivajirao Krishnarao.

25. ('38) 25 A. I. R. 1938 Bom. 206 : 174 I. C. 820 : 40 Bom. L. R. 127, Sureshchandra Jamietram v. Bai Ishwari.

26. ('37) 24 A. I. R. 1937 Bom. 464 : I. L. R. (1937) Bom. 839 : 172 I. C. 300, Auraj Joharmal v. Dalpat Supadu.

19. ('27) 14 A. I. R. 1927 Pat. 271 : 6 Pat. 388 : 102 I. C. 449, Ganganand Singh v. Rameshwar Singh.

20. ('36) 23 A. I. R. 1936 Pat. 231 : 14 Pat. 824 : 162 I. C. 235, Mathura Singh v. Rama Rudra Prashad Sinha.

21. ('95) 19 Bom. 571, Gursandas Natha v. Ladka Vahu.

suit. The Court. I think, in that case went largely on the ground that in England there is in a minor a substantive right to set aside a decree against him on the ground of negligence by the guardian. I am not satisfied myself that that is so. There is no doubt one decision of *Malins V. C.*, (1874) 18 Eq. 573,⁶ in which the learned Vice-Chancellor seemed to think that such a right existed, but I have not been referred to any other case on the subject, and I never in my experience came across any case of that sort in England. A judgment may of course be challenged in an independent suit on the ground of fraud or collusion and if it were held that the negligent conduct of the guardian *ad litem* showed collusion with the plaintiffs, that undoubtedly would be a ground on which the judgment could be set aside. But mere negligence by a guardian cannot by itself be any evidence of fraud or collusion against the plaintiffs, who may very probably have no means whatever of ascertaining on what grounds the guardian acted. It seems to me in principle very dangerous to allow such a claim as this. A minor duly represented, as this minor was, by a guardian *ad litem* is bound by the order made just as effectively as an adult defendant would be, and to say that the decree against the minor can be set aside on the mere ground of negligence by the guardian for which the plaintiff is in no way responsible seems to me to open the door to a great deal of litigation. It might not be difficult for a minor on attaining majority to persuade his guardian *ad litem*, who is probably a relative, to admit negligence in the conduct of the minor's affairs in the suit. There appears to be no authority of this Court on the question, and I am not disposed to sanction anything in the nature of a fresh cause of action designed to re-open decrees legally passed. I myself prefer the view that in the absence of fraud or collusion, if a minor wishes to challenge a decree against him on the mere ground of negligence by his guardian, however, gross that negligence may be, he must do so in the suit, by such means as the rules of procedure provide."

It would be clear from the quotation given above that the learned Chief Justice was not satisfied that in England there is in a minor a substantive right to set aside a decree against him on the ground of negligence by the guardian. This was one of the principal reasons underlying the decision. A further reason was that the finality of a judgment obtained against the minor should not be disturbed unless fraud or collusion has been established and that it would be opening the door to a great deal of litigation if the minor were allowed to avoid a decree on the ground of gross negligence on the part of his guardian.

Before dealing with the reasons given by the learned Chief Justice for his decision, it is necessary to refer to a Full Bench decision of the Bombay High Court in *I. L. R.* (1939) Bom. 340.¹ It was held by the Full Bench that gross negligence, apart from fraud or collusion on the part of the next friend or guardian *ad litem* of a minor litigant, does not afford the basis of a suit to

set aside a decree obtained against him. The leading judgment in the case was delivered again by Beaumont C. J. The two reasons given by the learned Chief Justice are, firstly, that in the English law there is no substantive right given to the minor to challenge a decree obtained against him on the score of the gross negligence of the guardian and secondly, that a plaintiff who brings a suit against a minor is bound to see that a guardian *ad litem* is appointed, and it is for the Court to satisfy itself that the person appointed is a proper person. But the plaintiff is not bound, and is not in a position, to see that the guardian *ad litem* carries out his duties properly and if the guardian *ad litem* fails in his duty, it is difficult to see why the plaintiff who has proceeded in good faith in accordance with the rules of the Court should be deprived of the fruits of his judgment. If the cause of action exists, it must rest upon the peculiar anxiety of Courts to protect an infant who cannot protect himself. But it must be recognised that such regard for infants can only be exercised at the expense of finality in suits against infants, and at the cost of some injustice to an innocent plaintiff or persons claiming through him. To say, as some Judges have done, that it is just and equitable that a minor should not suffer by the negligence of his guardian is to regard only one side of the picture.

It appears to me that under the English law a minor possesses the right to avoid a judgment obtained against him on account of gross negligence of his guardian, though it appears that the usual practice there is to allow a review in case negligence is asserted and a separate action where fraud or collusion is alleged. Reference may be made in this connection to *Simpson on the Law of Infants*, Edn. 4, page 324, where it is stated that an infant defendant is as much bound by a judgment or order of the Court as an adult; but he may set it aside for fraud, negligence, error, or new matter. When dealing with new matter, it is stated by the learned author that a decree has been impeached, where there has been gross negligence by the next friend in the conduct of the infant's case, or new matter discovered since the date of the decree. Reference has been made in this connection to the case in (1874) 18 Eq. 573⁶ where the following observations occur :

"The question which I have to decide is, whether this infant, on whose behalf a decree was taken by consent in 1867, is to suffer by any negli-

gence or want of knowledge on the part of her then next friend. I am clearly of opinion she cannot be called upon to endure that inconvenience the proposition that an infant of tender years may have her whole fortune wrecked by the neglect of her next friend is so monstrous that I cannot pay attention to it."

Evidently this is a provision of the common law and is not contained in any statutory enactment. If it is a provision of the common law, it is a substantive right of the minor to have the decree vacated. In India it may be difficult to move the Court for a review of the judgment, in view of the observations of their Lordships of the Privy Council in *Chajju Ram v. Neki*.²⁷ There seems, therefore, no reason why the minor should not enforce his substantive rights by means of a separate suit. Reference may also be made to Seton's Judgments and Orders, Edn. 7, p. 939, where the following observations occur :

"In general, an infant, either plaintiff or defendant, is as much bound by a judgment as an adult, even though it has been irregularly obtained, especially when acquiesced in for some time and acted upon in subsequent proceedings. But under extraordinary circumstances (as of fraud, gross negligence, error, or new matter) an infant plaintiff has been allowed to show cause against a decree dismissing his bill He is not to suffer by negligence or want of knowledge on the part of his next friend."

In (1742) 26 E. R. 717²⁸ it was pointed out that an infant has to make the best defence the nature of the case will allow for when infants come of age they are certainly entitled to put in a new answer and to make a better defence if they can. It was further pointed out in that case that the infant is justified in saying, when he comes of age, that his guardian has mistaken his case entirely and the infant cannot in justice be refused from putting in a better answer and making the best defence he can. In (1747) 26 E. R. 1160²⁹ it was observed that it is right to follow the rule of law, where it is held an infant is as such bound by a judgment in his own action, as if of full age ; and this is general, unless gross laches or fraud and collusion appear in *the prochein amy*, then the infant might open it by a new bill. The above quotations show that the right of the infant to avoid a decree is fully recognised in English law. The procedure followed in English law is not the institution of a new suit but by an application in the nature of an application for review. Under the Indian law, the substantive right of the minor to

institute a new suit cannot be taken away either by S. 11, Civil P. C., or Ss. 2 and 44, Evidence Act. There seems to be no other impediment in the way of the minor in instituting a separate suit. Beaumont C. J., was not satisfied that a minor has a substantive right to set aside a decree against him on the ground of negligence by his guardian. He, however, acknowledged in the Single Bench judgment in 1937 that there was one decision of Malins V. C. in which the Vice-Chancellor seemed to think that such a right existed. In the Full Bench judgment in 1939 the learned Judge denied the existence of any such right. If the right is given by the Common Law of England to the minor to avoid a decree it must be regarded as a substantive right and not merely a matter of procedure or rule of evidence. If it is a substantive right the question of hardship to the other party does not really arise. A minor cannot be prevented from enforcing his substantive right, simply because this may cause loss or inconvenience to the plaintiff of the previous litigation.

In India we must be guided by rules of equity, justice and good conscience, and if it has become impossible or difficult for a minor to open a cause that has already been determined by way of review, in view of the observations of their Lordships of the Privy Council in *Chajju Ram's case*²⁷ there is no reason why the minor should not be allowed to institute a suit to avoid the decree obtained against him as a result of the gross negligence of his guardian. The leading case in the Calcutta High Court is 22 Cal. 8.⁵ The decision to the contrary in 12 Cal. 69¹¹ is no longer followed in the Calcutta Court. The latest Calcutta case is I.L.R. (1941) 1 Cal. 477.³⁰ All the previous Calcutta authorities were reviewed in this case. The English law as well as the Full Bench decision of the Bombay High Court were also considered. It was held that Courts give special protection to the minors against the negligent acts of their guardians. A decree against the minor can be set aside in a subsequent suit by him if the decree was passed against the minor as a result of gross and culpable negligence of the next friend or the guardian *ad litem*. Such a suit is not barred either under S. 11 or O. 9, R. 9, Civil P. C., or under S. 44, Evidence Act.

27. ('22) 9 A. I. R. 1922 P. C. 112 : 3 Lah. 127 : 49 I. A. 144 : 72 I. C. 566 (P. C.).

28. (1742) 26 E. R. 717, Bennet v. Lee.

29. (1747) 26 E. R. 1160, Gregory v. Molesworth.

30. ('41) 28 A.I.R. 1941 Cal. 401 : I.L.R. (1941) 1 Cal. 477 : 196 I. C. 779, Mahesh Chandra v. Manindra Nath.

The Madras High Court has consistently taken the view that a minor can sue to set aside a decree passed against him in a suit not only on the ground of fraud or collusion but also on the ground of gross negligence on the part of his guardian in the suit. Reference may be made in this connection to 45 Mad. 425,³¹ A.I.R. 1926 Mad. 1079,³² A.I.R. 1938 Mad. 13³³ and I.L.R. 1942 Mad. 526.³⁴ The last case discusses the entire case law on the point. The Full Bench ruling of the Bombay High Court was also considered and dissented from. The judgment of their Lordships of the Privy Council in I.L.R. 1937 Mad. 263,³⁵ was explained and it was observed that their Lordships did not decide the question whether a person could rely on the gross negligence of the guardian *ad litem* in a previous suit when he sought to set aside the decree passed therein. They were merely considering whether the principle expressed in India should be extended to suits with regard to public religious trusts and the answer was in the negative.

It was held in I.L.R. (1942) Luck. 1,³⁶ that a minor has the right, on attaining majority, to sue to set aside a decree obtained against him on the ground of his guardian's negligence, but it is not open to assume such negligence and to treat the decree as void on that ground. Where there is a properly appointed guardian *ad litem* and a decree has been passed by a duly constituted Court it must be presumed that there was justification for it, and the presumption can only be rebutted in a suit brought with that object. The result of a review of all the available authorities is that with the exception of the Bombay Court it has been laid down by all the High Courts in India that a minor can avoid a decree passed against him on the ground of gross negligence on the part of his guardian *ad litem* and it is not necessary for him to prove fraud or collusion on the part of such guardian. There is no decision of their Lordships of the Privy

Council bearing on the point. The Bombay view cannot be supported either on principle or binding authority. For the reasons given above, I would hold that a minor can avoid a decree passed against him on the ground of gross negligence on the part of his guardian *ad litem* even if he has not succeeded in proving fraud or collusion on the part of such guardian.

Ram Lall J.—I have had the privilege of reading the judgments recorded by my learned brethren Rashid and Mahajan and I agree with the answer proposed.

At one time I was much attracted by the argument that to allow a minor to reopen a case on the ground of gross negligence of his guardian would lead to endless frauds and litigation. *Prima facie* it appeared anomalous to allow this as a ground of attack when no such ground was available if a lawyer engaged on behalf of a minor was negligent. The answer to these objections has, I think, been stated with great lucidity by my brother Mahajan when he points out that there is no real hardship if a party who has succeeded only because of the negligence of the guardian amounting to a breach of duty is called upon to prove on a fair contest the correctness of his case. The litigation is reopened only when the guardian becomes grossly negligent and even then compensation for having to fight the matter a second time can be made by way of costs as a condition precedent to the matter being reopened.

The subsidiary difficulty is also solved by Mahajan J.'s pointing out that whereas when a lawyer is engaged, a degree of professional skill and vigilance is stipulated in the terms of his employment and an effective remedy by way of damages is available against professional persons so engaged. To insist on such a remedy against all guardians shown to be negligent would frighten away all honest and careful guardians, and against those who are left the remedy would be wholly ineffective and illusory. For the reasons given by my learned brethren I have no doubt that the right of a minor to get a decree vacated is a substantive right which cannot be taken away by any rules of procedure or any law regulating procedure. In England a remedy by way of review is available to enforce this right within six months of attaining majority. It is purely a matter of procedure how a right is to be enforced. In this country the remedy by way of review is no longer available after the decision of their Lordships of the

31. ('22) 9 A.I.R. 1922 Mad. 273 : 45 Mad. 425 : 70 I. C. 668, *Punnayyah v. Rajam Viruma*.

32. ('26) 13 A.I.R. 1926 Mad. 1079: 98 I. C. 787, *Moolaswami v. Tutayya*.

33. ('38) 25 A.I.R. 1938 Mad. 13 : 176 I. C. 477, *Narasu v. Baitharu*.

34. ('42) 29 A.I.R. 1942 Mad. 384 : I.L.R. (1942) Mad. 526 : 203 I. C. 526, *Egappa Chettiar v. Ramanathan Chettiar*.

35. ('37) 24 A.I.R. 1937 P. C. 1 : I.L.R. (1937) Mad. 263 : 64 I. A. 17 : 166 I. C. 1 (P.C.), *Venkataseshayya v. Kotiswara Rao*.

36. ('42) 29 A.I.R. 1942 Oudh 33 : I.L.R. (1942) 17 Luck. 1 : 196 I. C. 457, *Mohammad Bakhsh v. Allah Din*.

Privy Council in 3 Lah. 127.²⁷ In such circumstances the remedy by way of suit must be held to be available still.

Mahajan J. — "Whether a minor can avoid a decree passed against him on the ground of gross negligence on the part of his guardian ad litem even if he has not succeeded in proving fraud or collusion on the part of his guardian" is the question in the abstract that this Full Bench has been constituted to answer. I agree that the question be answered in the affirmative. In my view the answer can be justified both on principle and authority. It is no doubt true that an infant is as much bound by a judgment or order as an adult provided he was represented by a proper and diligent guardian. The only duty cast upon the litigant is that he should see that the opposite party, if a minor, is properly represented by a duly constituted guardian but he is under no obligation to see that the guardian ad litem vigilantly prosecutes the case on behalf of the minor. It may also be that an innocent party would have a serious grievance if an order obtained by him fairly in a contested matter is subsequently sought to be set aside on the ground that the minor's guardian acted negligently but none of these considerations can, in my opinion, affect the above answer.

The answer can be supported on broad principles of justice, equity and good conscience. It is these principles which must govern decisions of Courts in this country in the absence of statutory law on the subject. It cannot be seriously suggested that S. 11, Civil P. C., has any application to an action by a minor to have a decree vacated on the ground of gross negligence of his guardian. Under that section the Court is prevented from trying a suit or an issue which has already been determined, but if the judgment previously determining the suit or the issue is vacated because of the right of the applicant to avoid the judgment on the ground of fraud, collusion or gross negligence, the obstacle contemplated by S. 11 is automatically removed. The option of avoiding the judgment when exercised vacates the judgment itself. This option accrues after the judgment has been delivered and the judgment is good so long as it stands. Section 44, Evidence Act, is a part of the procedural law of India and it permits a party to show that the judgment or order which would have operated as *res judicata* is not binding on the party because it has been obtained by fraud or

collusion. This section is only permissive and not prohibitive. It cannot destroy any substantive right that may exist independently of the Evidence Act. It does not prevent evidence of negligence of the guardian being led in a case provided such a right exists independently of the Evidence Act and is a substantive right. In my opinion, there is no statute law in this country that debars a minor from avoiding a decree passed against him merely by reason of the gross negligence of his guardian. A substantive right of action even in cases of fraud and collusion is not based on any provisions of the statutory law. Section 44, Evidence Act deals merely with defences to an action.

Judgments *inter partes* cannot ordinarily be subject to a collateral attack except in cases of fraud and collusion and the question is whether in view of the special protection that law gives to infants, gross negligence of a guardian ad litem ought not to be placed on the same footing as a plea of fraud and collusion. The principle on which a judgment can be collaterally attacked on the plea of fraud is that the Court was unable to do justice having been misled or deceived. It is said that fraud and justice do not stand together. The classical quotation on this point is that fraud is an extrinsic or collateral act which vitiates the most solemn proceedings of Court of justice. In cases of fraud and collusion blame, however, does not rest alone on the guardian, it also rests on the opposite party, while in the case of gross negligence by a guardian the opposite party may be thoroughly innocent. This circumstance, however, in my judgment cannot stand in the way of the extension of the same principle to the case of a minor whose property has gone into the pocket of his adversary merely by reason of a complete thoughtlessness on the part of his guardian and as a result of a breach of duty on his part, and that but for such dereliction of duty the opposite party would never have got that property. No litigant has any right to profit by or to deprive a minor of his property simply by reason of the fact that the person interested with the duty to protect the interests of a helpless infant has misbehaved. Misbehaviour of a trustee of a minor can confer no rights on his opponent which in law and justice he does not possess. A Court is precluded from administering justice because of the gross negligence of the person entrusted with the duty of protecting the minor's interest and if this circum-

stance causes failure of justice, surely it cannot be said that rules of adjective law could stand in the way and so result in the perpetuation of injustice. The rule of finality of judgments and the proposition that there cannot be a collateral attack on them are after all matters of adjective law and based on considerations of expediency and cannot obstruct the administration of justice. To avoid a judgment on the ground of fraud and collusion is a well-recognised substantive right of a litigant, and so far as I can see such a substantive right exists in the case of minor litigants on the ground of gross negligence of a guardian as they have to depend for representation of their cases on others. In other words, on the ground of gross negligence of guardians they have a right to have the judgment vacated. Apart from fraud and collusion, a judgment may be liable to be set aside if it has been obtained by coercing a Judge. The broad principles of justice and equity which form part of universal jurisprudence and confer a substantive right of action on a minor or to avoid an otherwise binding judgment on the ground of gross negligence of his guardian were enunciated by Malins V. C. in (1874) 18 Eq. 573⁶ at p. 576 in these terms :

"The proposition that an infant of tender years may have her whole fortune wrecked by the neglect of her next friend is so monstrous that I cannot pay attention to it. She is entitled to have a next friend who is diligent and will protect her interests."

Whether an infant on whose behalf a decree was obtained by consent in 1867 was to suffer by any negligence on the part of a next friend was answered by the Vice-Chancellor in the following words:

"She cannot be called upon to suffer that inconvenience." The same view was expressed in (1742) 26 E. R. 717.²⁸ This principle has been enunciated by all the text book writers on the law of infants and has been recognised by commentators on the law of "judgments." It has also been stated in Hailsham's edition of Halsbury's Laws of England. This principle finds recognition in the Statute Law of India in O. 32, Civil P. C. A duty is cast on the opponent of a minor and the Court to appoint a diligent guardian to safeguard the minor's interests and provision has been made for the removal of a guardian, who does not discharge his duty diligently. A further provision has been made in the Code that a minor plaintiff on attaining majority can elect to continue his suit or can drop it, if he so likes. Can it be said that because, the Court does

not do its duty by removing a negligent guardian for that reason the minor should suffer serious loss? I cannot subscribe to such a proposition. If the guardian appointed and the Court fail in their statutory duty I do not see why their breach should operate to the prejudice of the minor and confer a corresponding advantage on the opponent which in a fair fight he could not get. Not being able to retain the benefit of a one-sided decision against a minor which could not have been obtained if the guardian had been diligent in the conduct of the case, cannot be regarded as a just grievance of his adversary. Persons fighting litigation with those who are not *sui juris* have to take the risks involved in such litigation and they cannot be allowed to retain the benefits and advantages which are not really theirs at all, and have been obtained by them as a result of breach of duty on the part of persons who were entrusted by law to protect the infants.

It has been suggested in some cases that a minor cannot attack the judgment collaterally i. e., by a separate suit but that it is possible to have it vacated by proceedings in review. This is certainly a cheaper and an easier remedy, if available, and would sufficiently protect the minor. It is, however, doubtful if this remedy can be taken with confidence in view of the pronouncement of their Lordships of the Privy Council in 3 Lah. 127.²⁷ It may also be argued that just as an adult litigant whose case has been mismanaged by his lawyer can sue him in damages for negligence; similarly a minor can obtain a relief of like nature against his guardian. This argument loses sight of the fact that in truth there is no analogy between the two cases. In the first place, a suit for damages against a court official guardian or the mother or some distant uncle may be purely an illusory remedy. On the other hand, a suit for damages against a lawyer gives a party substantial relief. Moreover it is doubtful if such a suit can be maintained. A professional man engaged on payment has to discharge a certain duty and a certain amount of skill and diligence is expected from him in handling his client's case. As a matter of fact such exercise of skill and diligence is guaranteed in the terms of the employment of the lawyer. A guardian *ad litem* appointed by a Court, on the other hand, undertakes an onerous duty and it cannot be said that he guarantees some skill in the discharge of his duty. His indifference in the conduct of the minor's

case may not make him liable in tort for damages. Be that as it may, the remedy of a suit of this nature can seldom be suggested. It would certainly frighten away all cautious persons from undertaking responsibility for the conduct of cases on behalf of or against minors and a stage might be reached when no one, except court ahlmad or court reader, who knows nothing about the facts of a case has to be entrusted with the duty to protect the minor and he can never satisfactorily discharge that duty.

In my opinion, therefore, on the broad principles of justice, equity and good conscience the minor has a substantive right to have a previous judgment against him vacated on the ground that his guardian was grossly negligent in the conduct of the case and that his rights were thus seriously jeopardised. I may point out that negligence before it can furnish a cause of action to the minor should be gross; in other words, it should be an omission to take that case which even inattentive and thoughtless men never fail to take in their own cases. Suppose, for instance, that a mother of a Muhammadan minor governed by Muhammadan law has sold away the immovable property belonging to the minor and in an action against the minor by the purchaser no defence is raised that the sale is a nullity and confers no title on a purchaser. An obvious defence not having been raised the minor's property is illegally transferred to the purchaser. It is difficult to say that the minor has no remedy and that the injustice done to him must be perpetuated. Take another instance. In a suit brought for possession of immovable property against a minor 20 years after the right had been extinguished a guardian does not raise a plea to that effect. Should the minor suffer and if so for what fault of his? On what principle of justice could the opponent keep the property to which he had no subsisting title. Suppose a guardian *ad litem* is advised by a lawyer in a perfectly good case to appeal against the judgment of the trial Court but in spite of that advice the guardian fails to appeal and the minor suffers loss. I do not see on what principle of law can it be held that the minor has no redress and that his opponent would suffer a just grievance in not being allowed to retain the fruits of a victory which he could not have got except by the negligent conduct of the guardian. There is overwhelming authority in this country in support of the answer. In this province since 1898 a suit of this nature

has been allowed. 35 P. R. 1898⁴ is the leading Bench decision in support of this view and apart from published cases it has been followed in numerous decisions to my own knowledge. As a matter of fact before 1939 even a plea to the effect that a suit of this nature was not maintainable was not raised. 1 Lah. 27¹⁰ is a case that has been quoted several times as an authority to a contrary effect. This is a judgment by Scott-Smith J. That learned Judge in an earlier case, sitting with Leslie-Jones J., reported in 103 P. R. 1917⁹ had expressed the opinion in accordance with the view taken in 35 P. R. 1898.⁴ After 1 Lah. 27¹⁰ in a later case sitting singly the learned Judge expressed a similar opinion. While deciding the case in 1 Lah. 27¹⁰ his attention was not drawn to the bench decision 35 P. R. 1898.⁴ On the other hand, the Calcutta decision in 12 Cal. 69¹¹ was cited before him and he followed it without expressing any opinion in respect to the previous decision of the Punjab Chief Court. In my view this decision cannot be cited as an instance of conflict of decision in this Court on this point, because there was no conscious departure from the view taken in 35 P. R. 1898.⁴ I think I am justified in saying that the course of decision in this Court throughout has been in support of the view taken in 35 P. R. 1898.⁴

After the decision of the Full Bench of the Bombay High Court in I.L.R. (1939) Bom. 340¹ the matter was referred to a bench in this Court. This was in 24 Lah. 113.³ The point referred concerned the proposition whether a decree obtained against a minor could be vacated by him by an action on the ground of gross negligence of the guardian *ad litem*. The bench did not, however, consider the full question referred but pronounced on a limited question. It held that a *consent* decree obtained owing to the negligence of a guardian could not be set aside at the instance of a minor, except on the plea of fraud and collusion and that gross negligence of the guardian did not entitle the minor to have a relief similar to the one he was entitled to in cases of fraud and collusion. In other words, a consent decree was placed on a higher footing by the bench than a decree that had been obtained after contest against a minor. For this proposition reliance was placed on S. 147, Civil P. C., which enacts that a decree passed on a compromise made by a guardian *ad litem* with the sanction of the Court against a minor stands on the same footing as a decree passed against an adult. The

effect of this section is that it places consent decrees passed against minors after certain formalities had been gone through on the same footing as consent decrees passed against adults, but the section does not justify the conclusion that consent decrees stand on a higher footing than contested decrees. If I may say so, it is a settled proposition of law that a decree passed by consent has no greater sanctity than the contract on the basis of which it has been passed. When the contract can itself be avoided the decree can also be avoided. A consent decree can certainly be set aside on pleas of fraud and collusion and in my opinion it can as well be set aside on the plea of gross negligence in the case of a minor. This plea is an exceptional plea which is only permissible in the case of minors. I do not see on what principle of law a consent decree can be placed on a higher footing than a decree obtained after contest. In the leading case of English Courts (1874) 18 Eq. 573⁶ the decree was one that had been passed on a compromise. In some previous judgments of the Punjab Chief Court the decrees that were set aside on the ground of gross negligence were decrees passed on a confession of judgment or compromise. In my judgment the case in 24 Lah. 113³ (I speak with great respect) was not correctly decided and does not lay down sound law.

I am of the opinion that it is rather too late in the day to unsettle the settled proposition of law laid down in 35 P. R. 1898⁴ by the Punjab Chief Court. During my long experience at the Bar, I saw no cases in which doubts were ever cast on the rule laid down therein. The decisions in Patna and Madras have uniformly taken the view which this Court has taken. The Bombay decisions before 1937 took the same view. In Allahabad a Full Bench answered the question referred to us in similar terms that my Lord Rashid has answered. In Calcutta the latest cases have expressed a similar opinion and the Full Bench of the Bombay Court has not been followed. That Full Bench has again not been followed by Din Mohammad J. in a recent case in this Court. Madras has also refused to follow the Full Bench decision of the Bombay High Court. Lucknow and Rangoon Courts have taken the same view. The preponderance of judicial opinion in this country, therefore, is in support of the answer.

The only real case to the contrary effect is the Full Bench decision of the Bombay High Court in I.L.R. (1939) Bom. 340.¹ I have

carefully examined that decision and I respectfully agree with the opinion expressed by Din Mohammad J. in A. I. R. 1940 Lah. 205¹⁵ that the reasons given by the learned Judges of the Bombay Full Bench are not convincing. One of the learned Judges took that view with considerable hesitation. The other learned Judges were influenced in their decision by the consideration that under English law such an action was not permissible. It may be that in English law such an action, or in other words, an original bill cannot be filed by the minor for the reason that the remedy by way of review is available; but that is only a matter of procedure and not a matter of substantive law. A minor can obtain relief under English law for the gross negligence of his guardian in one form or another. That being so, I do not see why he should be disentitled to get relief in India, and if that relief cannot be obtained by review I do not see why it could not be available to him by filing a separate suit. This question came up for consideration before their Lordships of the Privy Council in I.L.R. (1937) Mad. 263³⁵ and some of the decisions mentioned in my brother's judgment in support of the proposition were cited before their Lordships. Their Lordships did not negative the rule laid down in these decisions in favour of a minor. On the other hand, they observed that this was a special plea available to minors for vacating previous judgments passed against them and was intended for the protection of minors. The matter has been elaborately discussed by Sir Shah Muhammad Sulaiman C. J., Allahabad High Court, in 54 ALL. 646.² In that decision the learned Chief Justice expressed the opinion that where a guardian has been grossly negligent in the conduct of the minor's case, in substance it becomes a case where the minor has not been represented in fact, though he has been technically represented in law. Substantially speaking, the minor's case has gone by default and, therefore, the minor should not be prejudiced and his adversary allowed to reap the benefit of an unequal fight. With great respect I express my agreement with that view.

It may be urged that by allowing a minor litigant the additional plea of gross negligence of his guardian to have a judgment vacated he is being placed on a higher footing than an adult litigant. I think that contention is unsound. He is only being given the same opportunity to fight out his case fairly as exists in the case of an adult. By merely

getting the former decree vacated the minor does not automatically win the case against his adversary. The fight re starts, and the minor's opponent can still win the case after a fair fight. If he loses he disgorges the unfair advantage that he had obtained and that cannot, therefore, furnish him with a just grievance. In the case of an adult litigant if he keeps certain documents of title in his pocket and loses the case or does not prefer an appeal in a perfectly good case in spite of the advice of his legal adviser he suffers for his own fault and has nobody else to blame. Similarly, if an adult party to a case is directed by a revenue Court to file a civil suit within a certain time and he fails to do so and loses the property he reaps the consequences of his own act and same is the case if he fails to put forward perfect defences available to him in a civil litigation. But in the case of a minor, the minor litigant in all these supposed cases suffers not for any fault on his own part but by reason of the fact of minority and infancy. He himself is helpless; he is in the hands of others and those others are grossly careless. In these circumstances on no principle of justice and fair play should he be allowed to suffer. To deny the minor the plea of gross negligence of his guardian in such like cases is to deny him bare justice and is to handicap him to a fight against his adversary who can always be compensated when the litigation is reopened by handsome costs.

It was said that if a guardian *ad litem* has engaged a lawyer he has done what he was expected to do and what any adult similarly situated would have done and the plea of gross negligence of the guardian, therefore, cannot arm the minor with a new weapon. In the first place, lawyers are not necessarily engaged in all litigations. But even so, it may be that the guardian does not supply the lawyer with relevant documents and material in his possession and by reason of his carelessness the lawyer himself feels helpless and cannot safeguard the minor's interest. Injury in such cases to a major litigant is caused by himself and disentitles him to relief while that is not so in the case of a minor. The conduct of a guardian may be callous and faulty and he may not carry out the directions of the lawyer and may not even file an appeal when the lawyer advises an appeal and certifies the case to be a good one for appeal. I see no reason why the minor should suffer in these eventualities. In some cases this

rule has been sought to be justified on the ground that cases of gross negligence of a guardian of a minor stand on the same footing as fraud and collusion and that gross negligence in instance similar to the one I have given amounts to fraud. I cannot subscribe to this view because gross negligence and fraud are in law two mutually exclusive concepts, though the same facts may be evidence either of one or the other. In my view, therefore, apart from fraud, gross negligence of the guardian itself without more is a ground to vacate a judgment against a minor and is sufficient to reopen the previous litigation. These cases will now be remitted to the Single Bench for final disposal.

D.S./D.H.

Answered in the affirmative.

[Case No. 44.]

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SPECIAL BENCH

**ABDUR RAHMAN, MAHAJAN AND
MARTEN JJ.**

*Subedar Shingara Singh and another
— Plaintiffs — Appellants*
v.

*Brigadier C. H. D. O. Callaghan and
others — Defendants — Respondents.*

First Appeal No. 8 of 1946, Decided on 7th February 1946, from order of Sub-Judge 1st Class, Delhi, D/- 7th January 1946.

(a) Civil P. C. (1908), S. 80—S. 80 applies to any kind of suit, whatever relief sought, including suit for injunction — Court-martial of accused on various charges, started — Suit by accused to restrain members of Court-martial from proceeding with trial — Notice under S. 80 not given — Suit held was not maintainable.

A Brigadier, under the authority given to him by the Commander-in-Chief convened a General Court-martial consisting of seven military officers, to try the accused on various charges. After the trial had begun, the accused brought a suit against the members of the Court-martial to restrain them from proceeding with the trial and contended that a notice under S. 80 was not necessary to be served before filing the suit as he was claiming an injunction in respect of the acts to be performed in future only and not in respect of past acts, that S. 80 did not apply as the members were not holding the Court-martial in their official capacity, that inasmuch as S. 80 was intended to protect public officers from individual liability, it could not apply when no relief was claimed against the members in their public capacity but was claimed in their private capacity:

Held (i) that S. 80 applies to any kind of suit, whatever the relief sought, including a suit for injunction. It applies to suits which relate to mandatory injunctions in respect of acts which have already been performed as well as suits in which

prohibitory injunctions in respect of threatened acts are asked for. Since protection was by statute intended by the Legislature to be given to the Crown or its public officers to make amends for the act if they would care so to do or for taking legal advice before deciding their course of action in regard to an action which had already been taken or to a contemplated action it could not be taken away simply because a plaintiff considered that he would suffer an irreparable injury or because he chose to add a prayer for an injunction in his suit: ('27) 14 A. I. R. 1927 P. C. 176, *Expl. and Foll.*; *Case law discussed.* [P 254 C 1]

(ii) that the relief sought was not in respect of acts to be done in future only but also in respect of past acts as the Court-martial had already assembled and begun the trial of the plaintiffs. The future acts to be performed by the members of the Court-martial could not be attacked without assailing the validity of the acts which had already been performed by them; [P 254 C 2]

(iii) that the Brigadier could not refuse to convene a General Court-martial and the members of the Court-martial who were also military officers, could not refuse to function as a Court-martial under the Army Act when ordered so to do by a competent authority. As these acts were purported to be done by the defendants in their official capacity they would fall within S. 80; [P 254 C 2]

(iv) that the relief asked was not in the private capacity against the members of the Court-martial but was in their public capacity: ('35) 22 A. I. R. 1935 All. 106, *Disting.*; [P 254 C 2]

(v) that the provision of notice under S. 80 applied to the suit and the suit was not maintainable in the absence of such notice. [P 255 C 2]

C. P. C. —

('44) Chitaley, S. 80, N. 10, Pt. 1; N. 2, Pt. 3 and N. 11.

('41) Mulla, S. 80, P. 306, Pt. (x); P. 307, Pt. (q); P. 308, Pts. (w), (x).

(b) Civil P. C. (1908), S. 2 (17) (c) — Military officers acting as members of Court-martial are 'public officers.'

The military officers acting as the members of a General Court-martial which is convened by a Brigadier under the authority of the Commander-in-Chief are 'public officers,' within the meaning of Section 2 (17) (c). [P 254 C 2; P 255 C 1]

(c) Specific Relief Act (1877), S. 42—Simple suit for declaration that Ordinance is *ultra vires* cannot be maintained.

A simple suit for a declaration that an Ordinance promulgated by the Governor-General is *ultra vires* cannot be maintained within the meaning of S. 42 as it does not ask for a declaration either in regard to any property or in regard to any legal character of any individual. But the case is different if such a point arises collaterally between two parties. [P 256 C 1]

(d) Specific Relief Act (1877), S. 42—Suit for declaration that plaintiffs are not liable to be tried by Court-martial does not fall under Section 42.

The claim to seek immunity from the trial under the Indian Army Act, 1911, is not one for establishing status or legal character. Therefore, a suit for a declaration that the plaintiffs are not liable to be tried by a General Court martial does not fall within the ambit of S. 42, Specific Relief Act. [P 256 C 1]

(e) Civil P. C. (1908), O. 1, R. 9—Suit against members of Court-martial for injunction restraining them from trying suit — Legality of Indian Army and Indian Air Force (Amendment) Ordinance (42 [XLII] of 1945) questioned by plaintiffs—Central Government not impleaded as defendant — Suit held was not properly constituted.

A Brigadier, under the authority given to him by the Commander-in-Chief convened a General Court-martial consisting of seven military officers to try the accused on various charges. After the trial began the accused brought a suit for a declaration that they were not subject to Indian Army Act within the meaning of Ss. 41 and 67 of that Act and for an injunction restraining the defendants from exercising any authority as a Court-martial over the plaintiffs in respect of the charges and from proceeding further with the suit. The plaintiffs questioned the legality of the Indian Army and Indian Air Force (Amendment) Ordinance (1945) promulgated by the Governor-General on the ground of its being *ultra vires* in character. The Central Government was, however, not impleaded as a party to the suit:

Held that the suit as framed was not properly constituted. The suit was instituted against the Brigadier and the members of the Court-martial and even if the reliefs claimed by the plaintiff could possibly be granted to them, they would have become infructuous as soon as another Court-martial was ordered to be convened and was appointed in pursuance of that order. The action being one *in personam* and not *in rem* the decision could not bind a person who was not a party to the litigation. A Court would not be justified in adjudicating on the question of the *ultra vires* nature of the Ordinance in a suit of this character when the decision would be infructuous as against parties who were not before the Court. Further the reliefs asked for being discretionary the Court would refuse to exercise its discretion in granting such reliefs when it feels that its decision even if given could be set at naught by those who were not before it. [P 255 C 2; P 256 C 1]

C. P. C. —

('44) Chitaley, O. 1, R. 9, N. 5.

Badri Das, J. L. Kapur, R. C. Soni and Inder Dev Dua — for Appellants.

Basant Krishan, Advocate-General and Carden Noad — for Respondents.

Abdur Rahman J.— Shinghara Singh and Fateh Khan were enrolled as sepoy of the Indian Army in 1933 and 1930 respectively. Both of them were subsequently commissioned as Viceroy's Commissioned Officers in the 14 Punjab Regiment. They were serving the 5/14 Punjab Regiment when they were sent to Malaya. The Japanese attacked Malaya on 7th December 1941 and the regiment to which they were attached surrendered to the Japanese shortly afterwards. It is alleged on behalf of the plaintiffs that in order to protect themselves and the other Indians residing in Malaya, a league was at first formed in or about February 1942 in the name of the Indian Independence League which subsequently

constituted itself to be a provisional Government called the Azad Hind Government; that an armed force which came to be known by the name of the Indian National Army was then raised under Mohan Singh's command with the avowed objects of promoting unity amongst the Indians and of protecting them, whether in the army or not, from the ill-treatment which was being meted out to them by the Japanese, and that the plaintiffs had joined this army under "the pressure of compelling necessity and upsurging of a desire for Indian National Unity." This army was, however, disbanded in December 1942 and formed a nucleus for a new Indian National Army which came into existence early in 1943. As the Japanese lost the battle in April 1945 and the territories temporarily occupied by them were recovered by the British, the New Indian National Army was also dissolved and the plaintiffs surrendered to the British forces. They were brought to Red Fort at Delhi on 3rd November 1945 but before they had arrived in Delhi, Brigadier Thwaytes (defendant 8) was empowered by the Commander-in-Chief on 23rd October 1945 to convene a General Court-martial with the object of trying persons who happened to be in or were brought about subsequently to what is known as Jamna Area under his command. The warrant was signed by the Commander-in-Chief on 29th October 1945 (Ex. A-2) and a Court-martial composed of seven persons (defendants 1 to 7) assembled in Delhi on 16th December 1945 to try the accused on eight charges, a list of which was attached to the plaint, but to which it is unnecessary to refer in detail. Suffice it to say that with the exception of the sixth charge which related to waging war against His Britannic Majesty, all the other charges were in respect of offences which were alleged to have been committed prior to October 1942. It is common ground that the General Court-martial assembled on 15th December 1945 to try the accused on these charges for committing what are in the Indian Army Act described as civil offences. The charge-sheet framed by the tribunal and disclosed to the accused shows that the offences alleged to have been committed by them were those of murder, grievous hurt, waging war against the King, etc. Objection was taken on behalf of the plaintiffs to the commencement of the trial under S. 67, Indian Army Act, on the ground that seven out of eight offences were alleged to have been committed by them more than three years prior to the date on which the

Court-martial had assembled and when the trial was to begin. The prosecution relied in reply on an Ordinance called "The Indian Army and Indian Air Force (Amendment) Ordinance, 1945 (No. 42 [XLII] of 1945)," passed by the Governor-General and published in the Gazette of India Extraordinary on 31st October 1945. To this the plaintiffs contended by way of rejoinder that an Ordinance of that kind promulgated by the Governor-General was itself *ultra vires* and that it was not legally permissible for him to amend the Indian Army Act in that manner and to make the Ordinance retroactive. The objection was overruled by the Court-martial on 15th December 1945 and the trial was adjourned to 27th December 1945. A suit was then instituted by the plaintiff on 21st December 1945 in the Court of the Subordinate Judge at Delhi against seven persons who were members of the Court-martial (defendants 1 to 7) and Brigadier Thwaytes (defendant 8) Commanding Officer of the Jamna Area within whose jurisdiction the Red Fort is situate and who had convened the General Court-martial under the orders of the Commander-in-Chief, questioning the legality of the Ordinance promulgated by the Governor-General on the ground of its being *ultra vires* in character. It might be observed that either the Central Government was not impleaded as a defendant in this suit.

It was alleged in Paras. 3 and 4 of the plaint that after the 14 Punjab Regiment was ordered to surrender to the Japanese and the plaintiffs had become subject to the orders of the Japanese as their prisoners, "they ceased to be members of the Indian Army and were absolved from their oath or obligation which they had taken on their enrolment." The legality of the act of the Governor-General in promulgating the Ordinance extending the period, during which the offences were alleged to have been committed and were triable by the Court-martial, was questioned in Para. 14 and his power to amend an Act of the Indian Legislature retrospectively "or so as to affect or nullify a result which had already occurred under the law prior to the promulgation of the Ordinance" was attacked. It was also averred in the plaint that after the conclusion of the hostilities between Japan and His Britannic Majesty no emergency was in existence which could have entitled the Governor-General to frame the Ordinance or to amend S. 67, Indian Army Act, and that the exercise of his discretion by the Governor-

General could not, therefore, be held to be *bona fide* and was void in law. The legality of the Ordinance was also questioned on the ground that it would have effect beyond the normal life of an Ordinance. As to the offence covered by the sixth charge, it was pleaded that the defendants could not proceed with this trial "in direct contravention of the mandatory provisions of S. 196, Criminal P. C." It was alleged on behalf of the plaintiffs in Para. 15 of the plaint that a Court-martial was merely an administrative tribunal and was not a "Court" of law and that the defendants who were professing to act as members of the tribunal "may act without jurisdiction or in excess of jurisdiction under colour of authority which they do not possess under an Ordinance which has no statutory effect and is null and void in law."

The plaintiffs prayed for a declaration in the end (a) that they were not subject to the Indian Army Act within the meaning of Ss. 41 and 67 of that Act between 24th August 1942 and 30th April 1943 and were not liable to be tried by any Court-martial constituted under that Act, and in the alternative; (b) that even if they were subject to the Indian Army Act, they were not liable to be tried by the Court-martial for any offence which might have been committed by them prior to 15th December 1942; and (c) that they were not liable for any civil offence alleged to have been committed under S. 121, Penal Code, read with S. 41, Indian Army Act, without the sanction and the initiative of the Central or Provincial Government as mentioned in S. 196, Criminal P. C.

The plaintiffs had also prayed for a permanent injunction restraining the defendants from exercising any authority as a Court martial over the plaintiffs in respect of all or any of the charges mentioned in the charge-sheet and from proceeding further with the trial which had been commenced on 15th December 1945 against the plaintiffs in respect of the said charges, in addition to asking for an *interim* injunction in the same terms in which the permanent injunction was asked for.

An application for a temporary injunction under O. 36, R. 1 and S. 151 Civil P. C., was presented to the Subordinate Judge at Delhi. Mr. Bhulabhai Desai appeared to press that application and succeeded in persuading him to grant a temporary injunction. Objection was taken to this on behalf

of defendants on 3rd January 1946 on several grounds. It was, *inter alia*, urged that the suit itself was not maintainable for want of notice under S. 80, Civil P. C. A large number of other points were taken and appear to have been discussed by learned counsel for the parties. By an order which is unnecessarily apologetic (it should not have been so) the Subordinate Judge discharged the injunction for he was *prima facie* of opinion that the objection in regard to want of notice appeared to have considerable force and that the action could not in all probability be maintained without the sanction of the Governor-General as required by S. 270, Government of India Act. The plaintiffs preferred an appeal against this order to this Court. This has been placed for hearing before a Special Bench of this Court.

After going through the order of the lower Court, I felt that apart from the nervousness the Subordinate Judge had exhibited in disposing of the application and in referring to matters which were not and should not have been his concern, at least at that stage, it would be better in the interests of all concerned and would avert an unnecessary waste of public time and money if we were to transfer the suit to this Court and to dispose of it ourselves particularly as the various questions which arose for determination were those of law and required no or very little oral evidence for their adjudication. My learned brothers shared this view and we transferred the suit to this Court. No objection was raised by either party to this course and the preliminary points which arose in the suit and the appeal were argued by R. B. Badri Das on behalf of the plaintiffs. This judgment will, therefore, not only dispose of the appeal preferred on behalf of the plaintiffs against the discharge of the temporary injunction but also the suit transferred to this Court by our order.

The first question to decide is whether the present suit is maintainable in the absence of a notice to the defendants under S. 80, Civil P. C.? As the form in which the plaint was drafted and the effect of failure to implead the Central Government as defendant also came under discussion during the course of his arguments by learned counsel for the plaintiffs, it appears to be advisable to express my view in regard to these matters but I should like to defer their consideration until after the question as to the necessity of service of notices under S. 80, Civil P. C., has been examined

and the result of their absence on the suit ascertained.

Learned counsel for the plaintiffs contended, in the first instance that it was unnecessary to give a notice under S 80, Civil P. C., before instituting the present suit as the plaintiffs had asked for an injunction with the object of restraining the defendants from trying them as a Court-martial in future and the provisions of S. 80, Civil P.C., could only have been attracted if a relief had been sought in respect of their past acts alone. Secondly, it was urged that the section had no application as the defendants had not been holding the Court-martial in their official capacity. In the end, it was contended that inasmuch as S. 80 was intended to protect public officers from individual liability, it could not apply when no relief was being claimed against the defendants in their public capacity but in their private capacity. Section 80, Civil P. C., reads as follows:

"No suit shall be instituted against the Secretary of State for India in Council, or against a public officer in respect of any act purporting to be done by such public officer in his official capacity, until the expiration of two months next after notice in writing has been, in the case of the Secretary of State in Council, delivered to, or left at the office of, a Secretary to the Local Government or the Collector of the district, and, in the case of a public officer, delivered to him or left at his office, stating the cause of action, the name, description and place of residence of the plaintiff and the relief which he claims and the plaintiff shall contain a statement that such notice has been so delivered or left."

There was at one time conflict of judicial opinion on the correct application of S. 80, Civil P. C., when the suit was either for an injunction only or when one of the reliefs claimed by the plaintiff was that of an injunction. While the High Courts of Calcutta and Allahabad had held the section to apply to all suits regardless of the forms in which they were brought and of the reliefs which were claimed in them: for which see 50 Cal. 992¹ and 46 ALL. 884,² and High Court of Bombay was of the view that it was not incumbent upon a plaintiff to serve the opposite party with a notice under the section if the suit was for an injunction and the immediate result of the act to be committed by the opposite party was to inflict such an irremediable harm on the plaintiff as could not be compensated by damages: 40 Bom.

392³ and 48 Bom. 87.⁴ The course of decisions in Madras was not uniform. The earlier decisions of that Court had been to the effect that the provisions of the section were to be strictly complied with and a notice contemplated by the section was *sine qua non* for the institution of all kinds of suits against public officers: 37 Mad. 113⁵ and 41 Mad. 792.⁶ The later decisions went, however, a little beyond the Bombay view in so far that they did not confine the operation of S 80 to only such cases where no irremediable harm would be caused to a plaintiff by serving a defendant with a notice under S. 80 and held that the section on its true interpretation could not be held to apply to a plaintiff who was complaining of acts which had not been committed before the date of the institution of the suit but which a defendant intended to commit at any time afterwards. In other words, they held that a notice under S. 80, Civil P. C., was not essential if the suit was in respect of future acts: see 50 Mad. 239⁷ and 136 I. C. 777.⁸ In my judgment the decision of their Lordships of the Privy Council in 51 Bom. 725⁹ set this conflict at rest in favour of the Calcutta, Allahabad and earlier Madras view and the view taken in Bombay in 40 Bom. 392³ was expressly overruled and the decision in 48 Bom. 87⁴ from which their Lordships were hearing the appeal was set aside. It is true that the decision in 50 Mad. 239⁷ was not expressly referred to by their Lordships but this was because although decided on 27th August 1926, it was obviously not brought to their Lordships' notice in May 1927 as the report in which it appeared had not probably been by then published.

The absence of a reference to the decision in 50 Mad. 239⁷ led learned counsel for the plaintiffs, however, to contend that a notice under S. 80 was not held by their Lordships in 51 Bom. 725⁹ to be essential in a suit for injunction instituted with the object of restraining a defendant from committing any

3. ('16) 3 A.I.R. 1916 Bom. 296 : 40 Bom. 392 : 34 I.C. 535, Secretary of State v. Gulam Rasul.

4. ('24) 11 A.I.R. 1924 Bom. 1 : 48 Bom. 87 : 90 I. C. 13, Bhagchand Dagadusa v. Secretary of State.

5. ('14) 1 A. I. R. 1914 Mad. 502 : 37 Mad. 113 : 16 I. C. 947, Secretary of State v. Kalekhan.

6. ('18) 5 A.I.R. 1918 Mad. 62 : 41 Mad. 792 : 46 I. C. 86 (F.B.), Koti Reddi v. Subbiah.

7. ('27) 14 A.I.R. 1927 Mad. 166 : 50 Mad. 239 : 99 I. C. 284, Arunachalam Chetty v. David.

8. ('32) 136 I. C. 777 (Mad.), Krishnaswamisastri v. Syed Ahmed

9. ('27) 14 A.I.R. 1927 P. C. 176 : 51 Bom. 725 : 54 I. A. 338 : 104 I. C. 257 (P.C.), Bhagchand Dagadusa v. Secretary of State.

1. ('24) 11 A.I.R. 1924 Cal. 145 : 50 Cal. 992 : 75 I.C. 173, Dakshina Ranjan Ghosh v. Omar Chand Oswal

2. ('24) 11 A.I.R. 1924 All. 851 : 46 All. 884 : 80 I.C. 72, Abdul Rahim v. Abdul Rahim.

acts in future. All that was decided by their Lordships, in his submission, was that the provisions of S. 80 were "express, explicit and mandatory" and that the reasons of hardship or of irremediable harm caused to a plaintiff in waiting for two months before bringing his suit which had induced learned Judges of the Bombay Court in 48 Bom. 87,⁴ then under appeal, and in the earlier cases to come to a contrary decision, were held to be irrelevant in construing the section. He laid a great deal of emphasis on what their Lordships had said at the top of p. 747 and urged that the words "in respect of" used in S. 80, Civil P. C., were held by their Lordships to be wider than the word "for" used before the expression "done or intended to be done" used in the English Statute to which they had referred earlier. It is necessary, therefore, first to examine the Madras decisions in 50 Mad. 239⁷ and in 136 I. C. 777⁸ and then to consider whether in view of their Lordships' decision in 51 Bom. 725⁹ these cases can be held to have been rightly decided?

The suit in 50 Mad. 239⁷ was for a declaration that the property in dispute belonged to the plaintiff and defendants 3 and 4 and for an injunction that defendant 1, the Official Receiver of Ramnad, be restrained from selling them on 10th November 1924 as belonging to defendant 2. A notice was served under S. 80 on 5th November 1924 but the suit was instituted on 7th November 1924. When confronted with the objection that it was not maintainable before the expiry of the statutory period mentioned in S. 80, it was urged on behalf of the plaintiff that a notice was unnecessary (a) as the suit was not in respect of an act purporting to be done by the Official Receiver in his official capacity, and (b) as the suit was in respect of a threatened act and not in respect of an act which was begun before the institution of the suit. The first of these grounds does not seem to have been agitated before the learned Judges; but the second was. Ramesam J., who wrote the leading judgment in that case had to concede however, at p. 241 that the phrase "purporting to be done" was used in the present indefinite form and was grammatically wider than the phrase "purporting to have been done" and was "not inconsistent with a future act." But as a matter of ordinary idiom he was of the view that "the phrase 'an act purporting to be done' would ordinarily refer to past acts only whether finished or begun but incomplete and does not refer to future

acts." It does not seem to be easy to reconcile the conclusion finally arrived at by the learned Judge with what he had said earlier. It appears that by some process of reasoning which it is not easy to follow, the phrase which according to him was capable of being used both for the past and future was taken to apply to a past act alone—although there was nothing in the section or in the ordinary meanings of that expression—with great deference to him—to confine it only to what had been done in the past. Reilly J., who agreed with Ramesam J., had also to admit that "on the surface by their mere grammatical form, the words quoted appeared to be capable of including a future act," but he added in the next sentence as follows:

"But, when we probe into their meaning, can we say with propriety that an act purports to be done in any particular manner or capacity until it is actually done."

I must say that I have not been able to understand what the learned Judge tried to convey. Where was the necessity, first of all, for probing when the meaning of the words was clear, to use his own words, "on the surface by their mere grammatical form." Secondly, where was the necessity for adding the words "in any particular manner or capacity" in order to find out the meaning of the words "purporting to be done." If the Legislature had intended to convey an act which had already been done, could it not have used the expression "an act done or purporting to have been done" instead of the words "an act purporting to be done." Apparently the emphasis was meant to be laid on the word "purporting" with the object of protecting a public officer both in regard to an act to be done by him in his official capacity and in regard to the act purporting to be done by him in that capacity since the latter would always include the former. If the word "purporting" is therefore dropped, can it be legitimately contended that the words "to be done" were used by the Legislature for the word "done." The learned Judge appears to have felt this difficulty himself and had to say that the phrase in question was susceptible of two interpretations, "a wider interpretation including future acts and a narrower confined to past acts, and that at the least the narrower interpretation is as consonant with the wording of the section as the wider one." Having said this he began to look at the consequences to which the wider interpretation would lead and observed as follows:

"In practice almost all suits against public officers in respect of future acts will be suits for in-

junctions. Unless a suit for an injunction is to fail entirely of its purpose, it is often necessary that the plaintiff should obtain a temporary injunction pending the suit."

The considerations put forward by him at p. 246 to put the narrower construction were the same as had persuaded the learned Judges of the Bombay High Court to hold that S. 80 could not have been meant to apply where compliance with its provisions would lead to hardship or injustice in certain cases. But these Bombay cases and the decision in 48 Bom. 87⁴ to which both he and Ramesam J., had expressly referred were overruled by their Lordships of the Privy Council in 51 Bom. 725.⁹ As to the decision in 136 I. C. 777,⁸ it does refer to their Lordships' decision in 51 Bom. 725,⁹ but tries to distinguish it on grounds—and I say so with deference—which do not bear examination. Referring to their Lordships' decision, Curgenven J., observed that he could not find anything in that judgment except that their Lordships had held that S. 80 would "apply to any kind of suit, whatever the relief sought, including a suit for injunction" (what else, may I respectfully ask, was required?) but tried to distinguish it as he seems to have thought that a suit for injunction might very well be based upon past acts and not merely upon an apprehension of future action and that their Lordships' observations were in that case confined to cases where a suit for an injunction was based upon past acts only. This brings me to the decision of their Lordships in 51 Bom. 725.⁹ The facts and the nature of the plaint are given in the headnote at p. 726. It reads as follows:

"Owing to rioting in a municipal district the Bombay Government in 1921 made an order under the Bombay District Police Act, 1890, S. 25, for the employment of additional police there, and one under S. 25A for compensation for damage done, and directed that the expense in both respects should be recovered to a large extent from the Muhamadan weavers, who as a class were responsible for the rioting. By S. 25, sub-s. (4), a tax or rate in respect of additional police had to be recovered by the municipality, but on their default, by the Collector, who under S. 25A had to recover in respect of compensation. It was found impossible to recover from the weavers. Accordingly by a notification of 6th June 1923, the Government directed that the sums still required for both purposes should be recovered by the Collector from the shop-keepers, who were in a position to pass the charge on to the weavers. The earlier orders were not formally cancelled. The appellants, shopkeepers affected, sued the Secretary of State, the Collector and the District Magistrate, claiming a declaration that the notification was invalid, and an injunction restraining executive action under it. The suit was instituted less than two months after notice of the intention to bring it."

This clearly shows that their Lordships were called upon to decide a case which had asked for an injunction against certain threatened and future acts. After referring to certain English cases which had laid the foundation for the decisions in Bombay, their Lordships pointed out that even if those English decisions were taken to have been rightly decided, as to which their Lordships appeared to be in doubt, they could not be of any guidance in interpreting the meaning of the words used in S. 80, Civil P. C., "where the clause applies to all officers of Government and to all their official acts, and where the words 'in respect of,' a form going beyond 'for anything done or intended to be done' show it to be wider than the statutes on which the English authorities were decided." When this passage was pointed out to learned counsel for the plaintiffs, he contended, as observed before, that although their Lordships had decided that the words "in respect of" were wider than the word "for" used in the English statute before the words "anything done or intended to be done," yet they had refrained from deciding that the words "in respect of any act purporting to be done" were wider than what was conveyed by the corresponding words in the English statutes "for anything done or intended to be done" with the result that their Lordships' decision cannot be taken to have laid down that, although the words in the English statute could not refer to future acts, the words in the Indian statute did so. I pointed out to learned counsel during the course of his arguments that if the words "in respect of" were held by their Lordships to be wider than the word "for" used in the English statute, it could only be because the words in the Code of Civil Procedure were found to take in all kinds of suits which the word "for" used in the English statute might not have possibly done so, and that in view of the interpretation of the words "in respect of" it was unnecessary for their Lordships to interpret the words "the acts purporting to be done." R. B. Badri Das, learned counsel for the appellants, was unable to give a satisfactory reply. That their Lordships were not prepared to make any exception in favour of suits for injunction is clear by the following observation:

"A suit in which *inter alia* an injunction is prayed is still 'a suit' within the words of the section, and to read any qualification into it is an encroachment on the function of legislation."

Injunctions issued by Courts are of two kinds, prohibitory or mandatory. But it is

a matter of common knowledge that a larger number of suits are those in which prohibitory injunctions are asked for. It is not easy to conceive that while making the above observation their Lordships had overlooked the usual type of suits in which prohibitory injunctions in respect of threatened acts are asked for and were confining themselves to suits which related to mandatory injunctions in respect of acts which had already been performed. Curgenvin J. had been apparently misled by the following observation at pp. 747/8 of the Report :

"So, too, the contention that the act purporting to be done by the Collector in his official capacity, 'in respect of which' the suit was begun, was his threatened enforcement of payment is fallacious also, since the illegality, if any, is in the order for recovery of the tax. If that was valid, there was nothing to be restrained. Hence, though the act to be restrained is something apprehended in the future, the act alone 'in respect of which' the suit lies, if at all, is the order already completed and issued."

But this was the additional reason given by their Lordships not because suits for injunction in respect of threatened acts were not in the ambit of the section but because no relief in respect of "the order for recovery of the tax," which was a past act, had been asked for. That this was an additional reason is not open to doubt as their Lordships had used the word '*also*' after the word '*fallacious*' but this appears to have been lost sight of by Curgenvin J. in 136 I. C. 777.⁸ This decision, I might add, was not followed by a learned Single Judge of this Court in 14 Lah. 330.¹⁰

Since protection was by statute intended by the Legislature to be given to the Crown or its public officers to make amends for the act if they would care so to do or for taking legal advice before deciding their course of action in regard to an action which had already been taken or to a contemplated action, and that seems to be the only reason why this section was enacted, it could not be taken away simply because a plaintiff considers that he would suffer an irreparable injury or because he chooses to add, as their Lordships pointed out in their judgment, a prayer for an injunction in his suit. I might, however, add in the end that the Ordinance had been promulgated by the Governor General. The warrant for convening a General Court martial was signed by the Commander-in-Chief. The Court martial had been convened by Brigadier Thway-

tes and the Court martial had assembled and begun to try the plaintiffs before the institution of the suit. And inasmuch as all these acts had already been performed, the argument that S. 80 could not apply to the present case loses all its force for the future acts to be performed by defendants 1 to 7 could not be attacked without assailing the validity of the acts which had already been performed.

The second contention advanced by R.B. Badri Das, learned counsel for the plaintiffs, that defendants 1 to 7 were not holding the Court-martial in their official capacity but in their private capacity was not quite intelligible to me as it could not be disputed that defendant 8, a military officer, could not refuse to convene a General Court-martial and defendants 1 to 7, who were also military officers, could not refuse to function as a Court-martial under the Indian Army Act, when ordered so to do by a competent authority. The fact that they had no right in law to act is besides the point. If the act of convening a Court-martial and the act of holding a Court-martial were purported to be done by the defendants in their official capacity, they would fall within the ambit of S. 80, Civil P. C., and no suit could be instituted without complying with its provisions. That the defendants were acting in their official capacity could not be disputed as is in fact implicit in the prayer for injunction when they were asked collectively and individually to be restrained "by a permanent injunction from exercising any authority of a Court-martial over the plaintiffs in respect of all or any of the charges" and "from proceeding further with the trial which they had commenced on 15th December 1945 against the plaintiffs in respect of the charges."

The third objection that S. 80 was intended to give protection to public officers in their individual capacity and that no relief was claimed against the defendants in their public capacity but in their private capacity is equally devoid of force. The contention that no relief was being claimed by the plaintiffs against the defendants in their public capacity cannot be accepted. They were asked by the plaintiff's to be restrained "from exercising any authority as a Court-martial over the plaintiffs in respect of all or any of the charges" and this surely is not in their private but public capacity. That they are public officers cannot be doubted. They clearly fall within the definition of the term "public officer" as defined

10. (1933) 20 A I R. 1933 Lah 203 : 14 Lah. 330 : 148 I. C. 49, N. W. Railway Administrator v. N. W. Railway Union.

by s. 2 (17) (c), Civil P. C. Equally free from doubt is the fact that they had been acting and would act in future, if they do so, not in their private capacity but only in their official capacity.

Learned counsel for the plaintiffs drew our attention to four decisions and wished to argue that inasmuch as acting as a member of a Court-martial was not a part of an ordinary duty of a military officer, the defendants could not be held to be acting in their official capacity. Chronologically the first decision to which our attention was drawn was that of A. I. R. 1935 ALL. 106¹¹ where a Deputy Magistrate was appointed as the returning officer and it was held by Sulaiman C. J. and Rachhpal J. that the Magistrate could not be said to be a public officer within the definition of that term in s. 2 (17), Civil P. C. The learned Chief Justice had not, first of all, considered cl. (h) of that definition but even if they were right in holding that he did not fall within the definition of a public officer as defined in the Code of Civil Procedure, it cannot help the plaintiffs for a military officer is expressly referred to in sub-cl. (c) as a public officer and that there can be no denying the fact that the defendants were military officers at all relevant dates and are so even now. It is immaterial whether they were doing an ordinary act performed by military officers or an extraordinary act. I must however, point out that it is a part of a military officer's ordinary duties under the Indian Army Act to act on a Court-martial if he is called upon so to do and he cannot refuse to discharge it without being liable to the penalty of a disciplinary action for disobedience of a lawful order. The decision in A. I. R. 1935 Cal. 726¹² has no application to the present case as in that case no act was *done* by the public officer in his official capacity. An assessment had already been made before the supersession of a municipality and the officer appointed afterwards was not held to fall within s. 80 as no act was done or purported to be done by him in his official capacity.

The decision in A. I. R. 1940 Cal. 1¹³ only lays down that s. 80 was intended to afford protection to officials against personal res-

pensibility for official acts. It was, however, not found to be applicable in that case as the suit for possession was against the owners of the estate and that estate had not vested in the receiver. In the capacity of a receiver he was only required to defend the action against the legal owners and none of his acts had formed the subject-matter of the suit. The correctness of the decision in A. I. R. 1946 Pat. 31¹⁴ may be questioned on the facts of that case, as to which I say nothing, but the principle on which the learned Judges had decided the case cannot be taken exception to as no act was found to have been done by the Receiver in that case in his official capacity. For the above reasons I would hold that the suit instituted by the plaintiffs without serving the defendants with a notice under s. 80, Civil P. C., is manifestly bad and the suit is liable to be dismissed on that short ground alone. In view of this conclusion, it is strictly unnecessary to consider the question of the form in which the plaint was drafted. But as it was discussed by learned counsel for the plaintiffs, I cannot refrain from remarking that the Central Government whose official head the Governor-General was said to have transgressed the provisions of law in promulgating the Ordinance (42 [XLII] of 1945) was not impleaded as a party to the suit and in its absence the suit could not be held to have been properly constituted.

The suit as framed was both for a declaration and an injunction. It was instituted against eight defendants and even if the reliefs claimed by the plaintiffs could possibly be granted to them, they would have become infructuous as soon as another Court-martial was ordered to be convened and was appointed in pursuance of that order. The action being one *in personam* and not *in rem* that decision could not bind any person who was not a party to the present litigation. When this was pointed out to learned counsel for the plaintiffs, he urged that under the departmental rules the Government would not pursue the matter if this Court were of the view that the Ordinance was *ultra vires* the Governor-General. We are not concerned with the Governmental rules on the subject or with the attitude that the Governor-General or the Secretary of State may adopt in this matter. Looked at from a legal point of view I cannot think that a Court would be justified in adjudicating on the question of the *ultra*

11. (35) 22 A. I. R. 1935 All. 106 : 152 I. C. 817, Muhammad Ekram Khan v. Mirza Muhammad Bakar.

12. (35) 22 A. I. R. 1935 Cal. 726 : 159 I. C. 542, Chairman of Commissioners of Barulpore Municipality v. Sivadas Roy.

13. (40) 27 A. I. R. 1940 Cal. 1 : 186 I. C. 584, Bhuban Mohini v. Biraj Mohan.

14. (46) 33 A. I. R. 1946 Pat. 31 : 24 Pat. 514, Surendra Nath v. Jagat Narain.

vires nature of the Ordinance in a suit of this character when the decision would be infructuous as against parties who are not before us. It must be remembered that the reliefs asked for by the plaintiffs are discretionary and a Court would refuse to exercise its discretion in granting such reliefs when it feels that its decision even if given could be set at naught by those who were not before it. If, on the other hand, the act of the Governor-General is not found to be questionable in these proceedings it would have to be presumed to be valid unless it is declared not to be so and if so presumed this action is bound to fail. When an argument was addressed before their Lordships of the Privy Council in 51 Bom. 725⁹ that even if a notice was essential against the Secretary of State it was not necessary against the Collector, it was repelled by their Lordships of the Privy Council in the following words:

"An attempt was made to distinguish between the effect of S. 80 in the case of the Secretary of State and in the case of the Collector, and to argue that, even if it defeated the action as against the first-named defendant, it would fail to protect the second. Their Lordships cannot accept this. Not only has the suit been throughout a joint proceeding against the officials concerned, for the purpose of getting a joint declaration that the Government Notification was bad as the foundation of everything subsequently done, but without the presence of the Secretary of State before the Court, the Notification could not be assailed, and, if it stands as valid, the Collector's own action could not be successfully impugned."

A suit for a declaration to have the Ordinance declared *ultra vires* cannot be held to be maintainable within the meaning of S. 42, Specific Relief Act, as it does not ask for a declaration either in regard to any property or in regard to any legal character of any individual. The claim to seek immunity from the trial under the Army Act is not one for establishing status or legal character. The prayer, therefore, that the plaintiffs are not liable to be tried by the General Court-martial does not fall within the ambit of the section. There is divergence of judicial opinion on the question whether S. 42, Specific Relief Act, is exhaustive. But even if it is assumed to be possible to grant a declaration in a case beyond the provisions of S. 42, Specific Relief Act, a simple suit for a declaration that an Ordinance promulgated by the Governor-General was *ultra vires* would not be in my view maintainable. It may have been different if a point of this nature arises collaterally between two parties but that is not the case here. Even in suits where a point as to the legality of an

Act or an Ordinance has been raised between private parties, the Governor-General or the Government, Central or Provincial, as the case may be, has been allowed to appear and represent his or its point of view. Reliance was placed in this connection on the decision of Madhavan Nair J. in A.I.R. 1931 Mad. 502¹⁵ and on the decision of Wallace J. in A.I.R. 1930 Mad. 349.¹⁶ But these decisions were based on the decision of their Lordships of the Privy Council in 22 Mad. 270¹⁷ and in both of them the persons who had brought the suits were held entitled to sue for declarations as they claimed to be entitled to discharge the office of *karnam* and to receive the emoluments attached to it. Moreover, the office of a *karnam* is hereditary and the suit in respect of such an office clearly falls within the scope of S. 42, Specific Relief Act. These decisions have, therefore, no application to the present case. For the above reasons I would dismiss the suit but in the peculiar circumstances of the case I would leave the parties to bear their own costs. In view of the fact that the suit has been dismissed, it is unnecessary to deal with the appeal filed against the order discharging the injunction. As the suit was not properly instituted, no injunction could have been granted in the suit and must be held to have been rightly discharged by the Subordinate Judge. The appeal, therefore, fails and is dismissed. I would, however, make no order as to costs.

Mahajan J. — I agree.

Marten J. — I agree.

V.W./D.H. *Suit and appeal dismissed.*

15. ('31) 18 A.I.R. 1931 Mad. 502 : 136 I. C. 38, Venkataraghayiah v. Chenchu Subbiah.

16. ('30) 17 A.I.R. 1930 Mad. 349: 124 I. C. 136, Subba Rao v. Secretary of State.

17. ('99) 22 Mad. 270 : 26 I. A. 16: 7 Sar. 459 (P.C.), Robert Fischer v. Secretary of State.

[Case No. 45.]

A. I. R. (33) 1946 Lahore 256

ABDUR RAHMAN J.

Mt. Diali — Defendant — Appellant
v.

Lachhman Singh and others,
Plaintiffs, and others, Defendants
— Respondents.

Second Appeal No. 1789 of 1943, Decided on 23rd October 1945, from decree of Dist. Judge, Gurdaspur, D/- 5th July 1943.

(a) Custom (Punjab) — Ancestral property — Entry in settlement record showing K's sons as persons in possession — Presumption.

Where the entries in a settlement record show that *K*'s sons were the persons in possession of the property, it must be presumed that *K*'s sons got the property from their father. But in the absence of evidence to show that *K* had inherited the property from his father the property cannot be presumed to be ancestral in character. [P 258 C 2]

(b) Civil P. C. (1908), S. 11 — Suit decided in favour of a party — Adverse finding in such suit cannot operate as *res judicata*.

Where the decision of a suit is in favour of a certain party but there is an adverse finding against that party on a certain issue that finding cannot operate as *res judicata* in subsequent suit as the party could not have appealed from the decision in the previous suit. [P 258 C 2]

C. P. C. —

(‘44) Chitaley, S. 11, N. 109, Pt. 1 and N. 110.

(‘41) Mulla, S. 11, P. 81, Pt. (m).

(c) Evidence Act (1872), S. 17 — Failure to deny allegations in plaint may be treated as admission for that suit only — Admission cannot be proved for purposes of subsequent suit.

Where in a previous suit the allegations in plaint as to the ancestral character of certain property are not denied by the defendant in his written statement, the failure to deny may be treated as an admission of the ancestral character of the property for the purposes of that suit but it is not an admission which is capable of being proved under S. 17, Evidence Act, for the purposes of a subsequent suit as the absence of denial cannot be treated as a positive admission as contemplated by S. 17. [P 258 C 2]

(d) Custom (Punjab) — Succession—Self-acquired property — Goraya Jats of Amritsar District — Daughters succeed in preference to collaterals of fourth degree.

According to the custom prevailing among Goraya Jats of the Amritsar District the daughter is to be preferred to the collaterals in the fourth degree for purposes of succession to the self-acquired property of the father : (‘36) 23 A. I. R. 1936 Lah. 802 and (‘41) 28 A. I. R. 1941 P. C. 21, *Rel. on*; (‘33) 20 A. I. R. 1933 Lah. 898, *Not approved*.

[P 260 C 1]

C. L. Aggarwal — for Appellant.

Sardar Harnam Singh —

for Respondents (Plaintiffs).

Judgment.—This appeal arises out of a suit brought by the collaterals of Dewa Singh in the fourth degree for the usual declaration that the gift made by his (Dewa Singh's) widow Mt. Jatto in favour of her daughter Mt. Diali was not binding on them. The parties are Goraya Jats; and although the land is situate in the Gurdaspur District, they had admittedly migrated from Buche Nangal, Tahsil Ajnala, District Amritsar, and the custom, therefore, prevailing in Amritsar District would govern the parties. The suit was contested by the daughter who alleged that the property gifted to her was not ancestral in character and that, in any case, she was under custom entitled to succeed to the property in preference to

collaterals. She had also questioned the plaintiffs' status as collaterals, but the trial Court found and the finding was affirmed by the lower appellate Court that the plaintiffs were collaterals in the fourth degree. That question is no longer in issue between the parties. The trial Court found that the land was not proved to be ancestral and that amongst Goraya Jats of the village Buche Nangal daughters were entitled to inherit in preference to near collaterals. On this finding the suit was dismissed. An appeal was taken against this decision to the District Judge, Gurdaspur. Mr. Ormerod who heard the appeal, refrained from giving any finding in regard to the character of the property; but after noticing the conflict of authority in this Court in regard to daughters and collaterals he chose to follow the settlement of 1940, which was more or less a reproduction of the earlier settlement of 1913-14, and held that in spite of the latest decision of a Division Bench of this Court in A.I.R. 1936 Lah. 802¹ he would like to follow the custom as re-affirmed by the tribe at the time of subsequent settlement in 1940, and would hold that the daughters were not to be preferred to collaterals in the fifth degree. On that finding the appeal was allowed and a decree was passed in favour of the plaintiffs granting them the usual declaration that the gift made by Mt. Jatto in favour of her daughter Mt. Diali would not be binding on the plaintiffs. Mt. Diali preferred a second appeal. When the matter came up before me, I wanted to have the finding of the lower appellate Court in regard to the nature of the property. Mr. Ormerod had, in the meantime, been transferred and was succeeded by Mr. Burke. Mr. Burke has come to the decision that although there was no proof on the record that the property was ancestral in character, yet in view of the earlier decision between the parties, where the property was alleged to be ancestral by the present plaintiffs, it may be taken to have been decided that the property was ancestral in character. I might say here that the question as regards the nature of the property was not put into issue in that litigation; but having regard to the fact that the then defendants (i. e., the predecessors-in-interest of Mt. Diali appellant) had not chosen to deny the plaintiffs' assertion that the property was ancestral in character, it was assumed by

1. (‘36) 23 A. I. R. 1936 Lah. 802 : 167 I. C. 314, *Jwala Singh v. Mt. Santi*.

that Court that the property in dispute was of that character. There is some difference in measurement of the property which was then in dispute and which is now in suit. The suit then was in regard to 316 *kanals* and 4 *marlas*, while the present suit relates to 332 *kanals* and 6 *marlas*. Nothing has been pointed out at the hearing which would show to me that the property now involved was identically the same. But, even assuming, without conceding, that the major portion of the property is the same, it must be remembered that the earlier suit which had been brought by the plaintiffs was, in fact, dismissed and no appeal could, therefore, have been filed by the predecessors of the present appellant for the obvious reason that the final decision of the suit was in their favour. This was realised by Mr. Burke but he appeared to place his finding on what he regarded to be an admission made by the appellant's predecessors-in-interest in that case. To this, learned counsel for the respondents has tried to add another ground. He has vehemently urged that even if the absence of a denial by the predecessors of the appellant in the earlier litigation were held as not amounting to an admission, it might be regarded to be relevant under Ss. 11 and 13, Evidence Act; for, it could not be disputed, he contended, that the character of the property was then asserted on behalf of his clients to be ancestral in the earlier litigation and that assertion was recognised by the Court in its judgment. An attempt was also made to contend that there was proof on the record that the property, which formed the subject-matter of the present litigation, was ancestral and it was, therefore, argued that if that evidence were to be read in conjunction with the absence of a denial by the appellant's predecessors-in-interest in the earlier litigation and with the decision of the Court which assumed the ancestral character of the property, the conclusion would be irresistible that the property was ancestral. It was also submitted that having regard to the entry in the settlement of 1940, the earlier decisions of this Court culminating in A. I. R. 1936 Lah. 802¹ could not be followed in the present case and the matter should be decided on the existing entry in the *riwaj-i-am*.

To take up the question of the ancestral character of the property first, I find that there is absolutely no evidence on the record to show that the property belonged to Ram Singh. It is also to be observed that the entries in the settlement record of 1852 do

not show Ram Singh's son Kehr Singh to be the holder of the property but the entries show that Kehr Singh's sons were in possession of the property. Having regard to certain authorities of this Court it may, therefore, be assumed that Kehr Singh's sons had got the property in dispute from their father. But in the absence of any evidence that Kehr Singh had inherited this property from his father Ram Singh, it could not be contended that the property must be presumed to have been ancestral in character. As a fact, therefore, there is nothing on the record to show that the property was ancestral. The question then is as to what is the effect of the earlier litigation on that question. That the finding in the earlier litigation is not *res judicata* is obvious. The decision of the Court being in favour of the appellant's predecessors-in-interest, they could not have appealed against it and, therefore, the finding even if there had been an issue on that point would not have the effect of *res judicata* as against them and consequently as against the plaintiffs. This is not seriously disputed but it was contended, as I have already observed, that the reference in the judgment of the Court that the property was ancestral was relevant under Ss. 11 and 13, Evidence Act. I might say at the outset it was not possible for a Court to depend on facts given in the earlier judgment. They should have been proved independently and the pleadings of the parties should have been put into evidence in order to enable the Court in the present case to see for itself as to what allegations were made on behalf of the present plaintiffs in that litigation and what attitude was adopted by the defendant's predecessor-in-interest in reply. But even if I were to take it that the defendants had not chosen to deny the plaintiffs' assertion, I can only come to the conclusion that it might have been possible for that Court to assume in the absence of a clear denial that the character of the property was ancestral but that would be, in my opinion, for the purpose of that case only and could not possibly have the effect of an admission which might have been capable of being proved under S. 17, Evidence Act. For the limited purpose of that case only the Court might have in the absence of a denial assumed, although even then it was not incumbent upon it so to do, that the property was ancestral; but the absence of a denial could not be, in my view, pushed any further and a positive admission could not be spelt out of it in the present litigation. Apart

from this, however, even if I were to accept the contention advanced by the learned counsel of the respondents that the statement by the Court in regard to the ancestral character of the property in that judgment is relevant itself under S. 13, Evidence Act, I would hold that that fact, even if relevant, is not sufficient, in my opinion, to come to a decision in their favour, particularly when the plaintiffs have failed to lead any evidence on the record that the property in dispute was ever held by the common ancestor Ram Singh in this case. In the absence, therefore, of any evidence leading me to hold that the property was ancestral, the statement by the Court, even if relevant—which I very much doubt—could not lead me to the conclusion that the property was ancestral, and it would not be sufficient to discharge the onus of proof which lay on the plaintiffs to establish that the property was ancestral. For the above reasons, I hold that the property in suit had not been proved to be ancestral and I must, therefore, assume for the purpose of this judgment that it was not ancestral.

The question then is as to whether according to the custom prevailing among the Goraya Jats of the Amritsar District the daughter is to be preferred to the collaterals in the fourth degree in respect of property which is not found to be ancestral, or that the collaterals in the fourth degree would be entitled to inherit the property in preference to the daughter. It is unnecessary to refer to all the decisions which had taken two opposite views in this Court. The decision in A.I.R. 1933 Lah. 898² and other cases, which led up to it, was against the daughters and in favour of the collaterals and the decision in A.I.R. 1936 Lah. 802¹ and other cases which led up to it was in favour of the daughters and against the collaterals. I might here with advantage refer to a decision given in regard to Goraya Jats of the Amritsar District which was produced in the lower Court as Ex. D. C./1. It is distinctly in favour of the daughters but suffers from the same infirmity — if that be an infirmity at all — which other judgments of this Court suffer from, that Tek Chand J. was a party to this judgment. So far as the authorities are concerned, I have not the slightest doubt that I would be bound by the subsequent decision of the Division Bench in A.I.R. 1936 Lah. 802¹ particularly as the view in that case was eventually affirmed by their Lordships of

2. ('33) 20 A.I.R. 1933 Lah. 898 : 144 I. C. 483, Santa Singh v. Mt. Santi.

the Privy Council in I. L. R. 1941 Lah. 154.³ It was, however, stoutly contended that the subsequent settlement of 1940 makes a great deal of difference and I should, therefore, follow the *Riwaj-i-am* of 1940 in preference to the decision of the Division Bench of this Court, which I have already referred. Question 55 and its answer in the *Riwaj-i-am* of 1940 of the Amritsar District are as follows :

Question.—Under what conditions are the daughters entitled to inherit : (a) in case of ancestral property, (b) in case of self-acquired property ?

Answer.—(i) The daughters are not entitled to inherit if the deceased has left any male child or male children. (ii) The daughters are not entitled to inherit in the presence of a widow. (iii) That the unmarried daughters are entitled to retain the property up to the time of their marriage even if the sons and the widows are not in existence. (iv) That the married daughters are entitled to retain the property absolutely and without any limitations if there are no collaterals up till the fifth degree.

It is then said that this *Riwaj* is applicable to both (a) and (b) of the question. Apart from the fact that the answer is not substantially different from that given in the *Riwaj-i-am* of 1913-14—and that is why it was assumed to be the same by the lower appellate Court—I might add that in sub-cl. (iv) of the answer it is not stated positively that the married daughters would not be entitled to inherit the property in every case in the presence of the collaterals of the fifth degree but only that they would not be entitled to inherit the property absolutely and without limitations in the presence of the collaterals of the fifth degree. In other words this clause, in the absence of a clear prohibition against the daughters, means in my view that the married daughters may be able to inherit the property although not absolutely and without limitations even in the presence of the collaterals of the fifth degree. But even if I were not quite correct in my interpretation, I would take it that the position given in the *Riwaj-i-am* of 1940 was not materially different from the position stated in the *Riwaj-i-am* of 1913-14. Moreover, if the correctness of the compiler's statement in the *Riwaj-i-am* of 1913-14 was clearly questioned by the learned Judges of this Court in the various judgments, I should have

3. ('41) 28 A. I. R. 1941 P. C. 21 : I.L.R. (1941) Lah. 154 : I.L.R. (1941) Kar. P.C. 22 : 68 I. A. 1 : 193 I.C. 436 (P.C.), Mt. Subhani v. Nawab.

considered it to be essential for the compiler to advert to that fact and then to make further inquiries in regard to that matter and to say that he had made further inquiries and had come to form the same opinion which had been expressed in 1913-14. There is no such reference in this *riwaj-i-am*. In the absence of any instances, to which reference should have been made by the compiler, I cannot possibly place any greater weight on the answer to question 55 than this Court attached to its predecessors in the *riwaj-i-am* of 1913-14. Moreover, I find from a decision of a Division Bench of this Court in A. I. R. 1942 Lah. 164⁴ that this *riwaj-i-am* of 1940 was actually referred to by the learned Judges of this Court and they were of the view that the *Riwaj-i-am* of 1940 stood in no better position than its predecessors. I would, for the above reasons, hold that the *riwaj-i-am* of 1940 does not, in any way, improve the position of the collaterals in regard to the self-acquired property and that the general rule given in Rattigan's Customary Law about the daughters getting the self-acquired property in preference to the collaterals continues to hold the field until the contrary is established in a particular case. For the above reasons, I would hold that the property in this case cannot be found to be ancestral and that the daughters are entitled to inherit the property in preference to the collaterals of the fourth degree. The appeal is accordingly allowed and the plaintiffs' suit dismissed. There is no reason to deprive the appellant of her costs. She will have them throughout. Leave to appeal granted.

K.S./D.H.

Appeal allowed.

4. ('42) 29 A.I.R. 1942 Lah. 164 : I. L. R. (1943) Lah. 135 : 201 I.C. 675, Mt. Jawali v. Lal Singh.

[Case No. 46.]

A. I. R. (33) 1946 Lahore 260

ABDUL RASHID AG. C. J. AND
MAHAJAN J.

Market Committee, Dhab Vasti Ram —
Defendant — Appellant
v.

Dewa Singh Sham Singh and others —
Plaintiffs — Respondents.

Second Appeal No. 599 of 1944, Decided on 14th November 1945, referred by Mahajan J., D/- 23rd April 1945.

(a) Punjab Agricultural Produce Markets Act (5 [V] of 1939)—Object of.

The object and scheme of the Act is to give protection to the growers from unscrupulous businessmen and to afford facilities to them so that they

may obtain a fair price for their produce.

[P 261 C 2 ; P 262 C 1]

(b) Punjab Agricultural Produce Markets Act (5 [V] of 1939), S. 2 (a)—Agricultural produce includes rice only in form of paddy and not milled rice.

The word 'harvested' as used in S. 2 (a) of the Act is synonymous with the word 'stored' or 'collected' and qualifies all the nouns, i. e., wheat, barley, rice, etc., that follow it and does not qualify 'cotton' alone. It is used in relation to the crop that has been gathered from the fields as such. Consequently the definition of 'agricultural produce' in S. 2 (a) will include rice only in the form of paddy and will not include milled or manufactured rice: Cri. Revn. No. 258 of 1944, *Rel. on*; ('44) 31 A.I.R. 1944 Lah. 432, *Ref.* [P 262 C 1, 2]

Basant Krishan Khanna, Advocate-General —
for Appellant.

Dev Raj Sawhney — for Respondents.

ORDER OF REFERENCE

Mahajan J.—This second appeal raises an interesting question on the interpretation of the definition of "agricultural produce" as given in Punjab Act, 5 [V] of 1939, S. 2 (a). The question is whether husked rice or manufactured rice is within the ambit of this definition. The trial Judge held it was within the ambit of this definition. He took the view that though the verb "harvested" qualified all the following nouns yet the phrase "harvested rice" included both husked and unhusked rice within the definition. The plaintiff's suit for a declaration that he was not liable for payment of the fee sought to be levied under this Act by the Marketing Committee for manufactured rice in his possession was dismissed. On appeal, the learned Senior Subordinate Judge held that the phrase 'harvested rice' in the definition of "agricultural produce" in S. 2 (a) was synonymous with the word "paddy." It meant rice as reaped and gathered in the fields and that is only in the form of paddy. Before rice is fit for human consumption it has to undergo a process of manufacture and therefore manufactured rice could not be described as agricultural produce and was outside the definition of that term in S. 2 (a) of the Act. In this view of the case, the learned Senior Subordinate Judge decreed the plaintiff's suit as prayed. The Marketing Committee has preferred this second appeal.

My attention has been drawn by the learned counsel for the respondent to a Single Bench judgment of this Court in Cri. Case No. 258 of 1944. In that case, the question was whether the term "agricultural produce" included within its ambit cotton seeds. It was held that the word "harvested" qualified not only cotton but all the nouns

that followed it, and that cotton seeds could not come within the term "harvested oil seeds." It was further held in that case that the intention of the Legislature was to include in the definition of the term "agricultural produce" only the commodities that are gathered from fields and in the condition in which they are gathered. This Single Bench judgment certainly supports the view taken by the learned Senior Subordinate Judge in this case concerning manufactured rice. Manufactured rice cannot be gathered from the fields. It is only paddy that is gathered from the fields and has to be converted into rice suitable for human consumption by a process of manufacture. The learned Advocate-General contested the correctness of the view taken in this Single Bench judgment. He argued that the word "harvested" only qualified cotton and did not qualify the nouns following the words harvested cotton. His contention was that the verb "harvested" was used with cotton in order to distinguish it from ginned cotton and that normally speaking the word "harvested" could not be employed with the nouns wheat, maize, barley, etc. The learned Advocate-General further pointed out that *gur* and *shakar* were included in the definition of sugarcane though they could only be given that shape by a process of manufacture. Mr. Inder Dev Dua, however, contended that these had been included specifically in the definition. It may be observed that the word "rice" ordinarily in the dictionary sense would include both husked and unhusked rice. The phrase "harvested rice" is not ordinarily used so far as I am aware. The word used in vernacular is "Dhan" or "*jhona*" for the unhusked rice and "Chawal" for the husked rice. What the Punjab Legislature included in the definition of "agricultural produce" when they used the word "rice" is not easy to determine. Whether they meant by rice paddy or they meant by rice both paddy and manufactured rice is a matter of some difficulty. As at present advised, I think that when the Legislature were including *gur* and *shakar* within the definition of "agricultural produce" they never intended to exclude husked rice from the definition of word "rice." But whatever they intended or did not intend that has to be gathered from the language employed. If the word "harvested" qualifies the word "rice" then in my view the finding of the learned Senior Subordinate Judge is right. But if the word "harvested" only qualifies cotton and not the following nouns as argued

by the learned Advocate-General, then the word "rice" would include both husked and unhusked rice. As the matter is of some importance and the correctness of the Single Bench judgment of this Court in the case mentioned above is challenged, I think it proper to refer this case to a Division Bench. The papers will be laid before Hon'ble the Chief Justice for nominating a Bench to hear this matter.

Judgment of the Division Bench

Mahajan J.—This second appeal raises an interesting as well as an important question of law. The plaintiffs in the case filed a suit for a declaration that manufactured, polished or milled rice was not liable to the levy of any fee under S. 19, Punjab Agricultural Produce Markets Act (5 [V] of 1939). The contention was that this product did not fall within the definition of the phrase "agricultural produce" as given in S. 2 of the Act. The suit was dismissed by the trial Judge on the ground that milled or manufactured rice was within the ambit of this definition. The learned Senior Sub-Judge on appeal took a contrary view and held that the word "rice" in the definition of the phrase "agricultural produce" in the Act was synonymous with the word 'paddy'; in other words, it meant rice as reaped and gathered in the fields and that could only be in the form of paddy. In the result the plaintiffs' suit was decreed as prayed. The Marketing Committee preferred a second appeal to this Court. The matter came up before me in Single Bench, but as the point was of some importance and as the correctness of another Single Bench judgment of this Court, which had taken a view against the appellant's contention, was challenged, I referred the case to a Division Bench. The phrase "agricultural produce" has been defined in S. 2 (a) of the Act in these terms:

"'Agricultural produce' means harvested cotton, wheat, barley, rice, oil seeds, maize, gram, sugarcane (*gur* and *shakar*) or any other crop which may hereafter be declared by notification to be agricultural produce for the purposes of this Act."

It may also be observed that the Act gives a definition of the word "grower" as meaning a person who grows agricultural produce personally, through tenants or otherwise. There are other provisions in the Act which deal with the constitution of market committees. While constituting those committees the statute has given representation to growers and persons who deal with the produce of those growers but not to tradesmen. The whole object and scheme of the Act is to give protection to the growers from un-

scrupulous businessmen and to afford facilities to them so that they may obtain a fair price for their produce. The question for consideration is whether the word 'rice' in the definition of the phrase "agricultural produce" in the Act means only rice in the husk or includes within its ambit milled and manufactured rice. Before rice is fit for human consumption it has to undergo a process of manufacture. In the rice growing localities, rice husking mills have been built or other crude machinery is put up to husk the rice and to make it marketable commodity fit for human consumption. The growers ordinarily gather the crop in the form of paddy and sell it in the market as such. To decide in what sense the draftsman of the Act used the word 'rice' in the definition of the phrase "agricultural produce," the whole scheme and policy of the Act has to be kept in view and the meaning has to be given to the word which is consistent and fits in with the general scheme of the Act.

The first point that has been stressed at the bar is the meaning to be attached to the adjective 'harvested' which precedes the noun 'cotton' in the definition. The further question is whether this adjective only qualifies the noun 'cotton' or also qualifies the succeeding nouns "wheat, barley, rice, oil seeds" etc., and if so, what is the sense in which the word 'harvested' was used by the draftsman of the Act. 'Harvested' in the dictionary sense means "reaped or gathered." In the Century Dictionary the following illustration has been mentioned as illustrating an appropriate use of this word: "I have seen a stock of reeds *harvested* and stacked, worth two or three hundred pounds." It seems that the adjective 'harvested' is used as synonymous with the word 'stored' or 'collected'; in other words, it is used in relation to the crop that has been gathered or collected from the fields as such. If this meaning is given to the adjective 'harvested' in the definition of the term "agricultural produce" in S. 2 (a) of the Act then, to my mind, it clearly applies to all nouns that follow it and does not qualify 'cotton' alone. The learned Advocate-General argued that the phrase "harvested cotton" had a meaning while the phrase "harvested wheat" or "harvested barley" was a misnomer. I am unable to agree with him in this contention. To my mind the phrase "harvested cotton" is as much a misnomer as "harvested wheat." In ordinary parlance nobody uses the phrase "harvested cotton." Staple cotton, ginned

cotton or cotton are the words ordinarily employed by the growers or business people for that commodity. Therefore, this argument of the learned Advocate-General does not impress me at all. "Harvested," as I have already pointed out, seems to have been used to indicate the intention of the Legislature that the Act only dealt with various crops grown by an agriculturist and which had been gathered or reaped by him and were ready for the market. It must be observed that rice crop as gathered from the fields is in the form of paddy: in other words, it is rice in the husk. In my opinion it is in the context word "rice" in this definition can only mean that, and cannot mean milled or manufactured rice, which is not grown as such but is produced by a process of manufacture, generally speaking not by the grower but by a trader. Reference in this connexion may be made to a Single Bench judgment of this Court in Criminal Revision No. 258 of 1944. In that case a question arose whether "cotton-seeds" fall within the definition either of oil-seeds or of harvested cotton in the term "agricultural produce" used in the Act. It was held that the term "harvested cotton" could not be held to include cotton-seed because it was not harvested as such. It was further held that the word "harvested" qualifies not only cotton but all the words that follow it. The following observations of the learned Single Judge may be cited with advantage:

"If we look at the second part of the definition of agricultural produce beginning from the words 'any other crop' it would be clear that the intention of the Legislature was to include in "agricultural produce" only the commodities that are gathered from fields and in the condition in which they are gathered and surely cotton-seeds are not commodities of that kind."

I record my respectful assent with the above proposition. In the light of these observations it is clear that manufactured or milled rice cannot fall under the harrow of the definition of "agricultural produce" given in S. 2 (a) of the Act. Milled rice is not gathered from the fields, but only comes into existence after a process of manufacture. The learned Advocate-General argued that the process of milling is a very crude process and can be performed by the agriculturist himself in the fields and, therefore, it should be held that milled rice is included in the meaning of the words "harvested rice or gathered rice." I regret I cannot accept this contention. Process of husking, milling, or polishing rice is never performed in the fields. Even in the case of growers when

for their own consumption they husk small quantities of rice that process is not performed in the fields. Ordinarily speaking the process of milling rice is not an ordinary avocation of an agriculturist. The learned Advocate-General then laid emphasis on the brackets that follow the noun 'sugarcane' in the definition given in the Act. The brackets include *gur* and *shakkar* in the definition of sugarcane. The learned counsel argued that *gur* and *shakkar* could only be produced by a process of manufacture and not otherwise; they as such could not be gathered from the fields. The Legislature, however, has included these two commodities by an artificial definition within the meaning of the word "sugarcane" and has treated them as harvested sugarcane because the process of making *gur* or *shakkar* is one that is usually carried on by the agriculturists in the fields. In this connexion reference may be made to the following observations made by a Bench of this Court in A. I. R. 1944 Lah. 432¹:

"The definition itself refers to 'any other crop,' showing that the preceding words are used in the sense of something gathered from the fields; and this means that the fee is to be levied on the produce brought from the fields to the factory. Mr. Basant Krishan lays stress on the fact that *gur* and *shakkar* are mentioned in brackets after sugarcane and these are products obtained from a crop rather than a crop in themselves as the word is ordinarily used. The reason does not seem to be any far to seek. *Gur* is often extracted by agriculturists themselves in or near their fields and they cannot escape the levy of the fee on sugarcane by selling the juice which they have themselves taken out of it. This does not mean that a fee could first be levied on the sale of sugarcane to a factory and then for a second time on the finished product. It is to be observed that *gur* and *shakkar* have been added after sugarcane in brackets, the plain grammatical intention being that they are not to be treated as anything different, but as being included in the term 'sugarcane'."

This contention of the learned Advocate-General, therefore, also is devoid of force. It may also be observed that the word 'harvested' as used in the definition of "agricultural produce" preceding the noun 'cotton' if a disjunctive adjective there it must have been followed by the adjunct 'and' before the definition proceeded to mention the other names, namely, wheat, barley, rice, oil-seeds etc. It follows, that this adjective was intended to qualify all the nouns following it and, therefore, it is clear that it is harvested rice alone that has been included in the definition of the phrase "agricultural produce" given in the Act. In my judgment

harvested rice is synonymous with the word paddy and does not include within its ambit manufactured or milled rice. For the reasons given above the decision of the Senior Sub-Judge must be maintained. I would accordingly dismiss this appeal with costs.

Abdul Rashid Ag. C. J. — I agree.

K.S./D.H.

Appeal dismissed.

[Case No. 47.]

A. I. R. (33) 1946 Lahore 263

ABDUR RAHMAN J.

Kartar Shah — Appellant

v.

Sanjhe Khan and others—Respondents.

First Appeal No. 43 of 1945, Decided on 23rd November 1945, from order of Sub-Judge, 1st Class, Bhera, D/- 19th February 1945.

(a) Civil P. C. (1908), O. 3, R. 4—Suit valued above Rs. 5000—Power of attorney expressly authorising pleader *P* appearing in trial Court to file appeal or engage other lawyer for that purpose—*P* having no right to appear in High Court — Power of attorney held authorised filing of appeal in High Court — *P* held could appoint other lawyer to file appeal and appear in High Court.

The power of attorney expressly authorised the pleader *P* who appeared in the suit in the trial Court to prefer an appeal in regard to any matter arising out of the suit or to engage any other Vakil or Barrister for that purpose. The valuation of the suit was over Rs. 5000. As *P* had no right to appear in the High Court the appeal arising out of the suit was filed in the High Court by an Advocate authorised by *P*. It was contended that as *P* was a pleader and could not have appeared in the High Court the power of attorney must be so construed as to permit him to file an appeal or to get an appeal filed before the District Judge only and not in the High Court. It was also contended that as *P* could not file an appeal himself in the High Court he could not appoint another Vakil or Barrister to present an appeal to the High Court:

Held that as the valuation of the suit was above Rs. 5000 no appeal could have been filed before the District Judge. The power, therefore, to get an appeal filed in the case could only have been given for High Court only. [P 264 C 1]

Held further that even if *P* had no power to appear in the High Court he could appoint another advocate to file the appeal and appear in the High Court. [P 264 C 2]

C. P. C.—

(44) Chitaley, O. 3, R. 4, N. 14, N. 17.

(b) Civil P. C. (1908), O. 22, R. 10; O. 1, R. 10 and O. 43 — Application by assignee of plaintiff's rights pending suit falls under O. 22, R. 10 and not O. 1, R. 10 — Order disallowing application is appealable under O. 43.

An application by a person to be impleaded as a party to the proceedings on the ground that the plaintiff's rights had been assigned to him during the pendency of the suit falls under O. 22, R. 10 and not O. 1, R. 10 and the order disallowing the application would be appealable under O. 43.

[P 264 C 1]

1. (44) 31 A. I. R. 1944 Lah. 432 : 216 I. C. 87, Dhanpat Mal-Tek Chand v. Emperor.

C. P. C.—

('44) Chitaley, O. 22, R. 10, N. 3.

('41) Mulla, Page 945, Note "Assignment of interest."

(c) Civil P. C. (1908), O. 22, R. 10 and S. 100

— Whether plaintiff had assigned his rights is question of fact.

The question whether the plaintiff had assigned his rights during the pendency of the suit is a question of fact. [P 264 C 2]

C. P. C.—

('44) Chitaley, S. 100, N. 28, Pt. 3.

Asa Ram Aggarwal — for Appellant.

Kundan Lal Gosain and H. R. Sachdev — for Respondents.

Judgment.—Two preliminary objections have been raised in this appeal. The first one is that the appeal is not competent and the second that the appeal has not been duly presented as Mr. Asa Ram Aggarwal had no authority to file an appeal in this Court. There is no merit in either of these contentions. As to the first objection, the appellant had made an application to the trial Court to be impleaded as a party to the proceedings on the ground that the plaintiffs' rights had been assigned to him during the pendency of the suit. This application could only be under O. 22, R. 10, Civil P. C., and not under O. 1, R. 10 of that Code. This was disallowed. An appeal against the order disallowing such an application has been expressly provided for in O. 43. The appeal could therefore be filed in this Court.

As to the second preliminary objection it appears that the appellant had appointed Mr. Prithi Chand Kapur, Vakil, to appear for him in the trial Court. The power of attorney expressly authorised the Vakil to prefer an appeal in regard to any matter arising out of the above suit or to engage another Vakil or Barrister for that purpose. Learned counsel for the respondents contends that in so far as Mr. Prithi Chand Kapur was a pleader and could not have appeared in the High Court, this power of attorney must be so construed as to permit him to file an appeal or to get an appeal filed before the District Judge only and not in the High Court. It was also contended that if he could not file an appeal himself in the High Court he could not have appointed another Vakil or Barrister to present an appeal to this Court. It cannot be disputed that the present appeal has arisen out of the proceedings in the suit and as the valuation of the suit was above Rs. 5000, no appeal could have been filed before the District Judge. The power therefore to get an appeal filed in this case could only have been

given for this Court only. If I were to construe the power of attorney in the manner suggested by learned counsel for the respondents, I would have to hold against the express provision contained in the power of attorney that no appeal could have been filed on behalf of the appellant in this case or that in other words the pleader was only authorised to appear before the trial Court and to do nothing else. This would be wholly opposed to what is stated in the power of attorney. Assuming, without conceding, that Mr. Prithi Chand had no power to appear in the High Court, there is no reason to suppose that he could not have appointed Mr. Asa Ram Aggarwal to file the appeal or to appear for the appellant in this Court. The presentation of the appeal could not therefore be held to be defective.

On the merits the order of the trial Court cannot be sustained. The appellant had made an application that the plaintiffs' interests had been assigned by them to him during the pendency of the suit. The plaintiffs did not contend that he would not be bound by the proceedings which had gone on so far but only wished to come on the record to enable him to continue the proceedings from that stage onwards. Learned counsel for the respondents contends that the interests had not been assigned. That is a question of fact and has not been gone into by the trial Court. Had that been gone into, and had it been found that the appellant's allegation was not established, the matter would be a different one but the application was dismissed *in limine* without even issuing a notice to the other side. I would, therefore, allow the appeal and order the trial Court to go into the question whether the plaintiffs' interests had been assigned to the appellant? If it finds in favour of the appellant, he should be brought on the record with the object of continuing the suit under O. 22, R. 10 (1). If, on the other hand, it is found that the appellant's allegation in regard to the assignment was incorrect or remains unestablished, his application would have to be negatived. In the circumstances of the case, however, I would leave the parties to bear their own costs in this Court.

G.N.

Appeal allowed.

[Case No. 48.]

A. I. R. (33) 1946 Lahore 265ABDUL RASHID AG. C. J. AND
MAHAJAN J.*Emperor*

v.

*Gian Chand and others—Respondents.*Civil Revn. Case No. 435 of 1944, Decided on
23rd November 1945, referred by Teja Singh J.,
D/- 16th May 1945.(a) Stamp Act (1899), S. 61 — Order as to
sufficiency or insufficiency of stamp duty by
trial Court — Order must have real existence
and cannot be implied.

Before the order of the trial Court regarding the sufficiency or insufficiency of the stamp can be made the subject-matter of consideration by the Court of appeal for the purpose of making a declaration, such an order must be really existing. An order by implication cannot be considered by an appellate Court and cannot validly form the subject-matter of consideration for the purpose of issuing a declaration. An order by the trial Court has been made obligatory as the order is to be the subject-matter of revision. The revising Court must see the order made by the trial Court and the reasons assigned therefor before affirming or modifying it. The words "making an order" make it perfectly clear that there must be a formal expression of opinion and that formal expression of opinion alone can be regarded as "making an order." The words cannot be taken to have been used loosely in a fiscal enactment : ('35) 22 A.I.R. 1935 Lah. 909, *Approved* ; Civil Ref. No. 2 of 1938 (Not reported), *Dissent.* ; ('29) 16 A.I.R. 1929 Lah. 770, *Disting.* [P 265 C 1; P 266 C 1]

Stamp Act —

('45) Chitaley, S. 61, N. 4, Pt. 2.

('41) Mulla, P. 152, Pt. (q).

(b) Interpretation of statutes—Fiscal enactment, construction of—Subject must be made expressly liable — In case of doubt decision to be in favour of subject.

A fiscal enactment must be strictly construed and no order should be made to the detriment of the subject unless the words of the enactment clearly make the subject liable. In the case of doubt, as to whether any additional stamp duty or penalty is or is not chargeable in respect of a document, the decision must be in favour of the subject. [P 266 C 2]

Stamp Act —

('45) Chitaley, Preamble N. 16, Pts. 1 and 3.

('41) Mulla, P. 4, Pt. (t).

Basant Krishan Khanna, Advocate-General —
for the Crown.*C. L. Aggarwal — for Respondents.*

ORDER OF REFERENCE

Teja Singh J. (16th May 1945)—The question involved in this revision petition is of considerable importance and there appears to be a conflict of opinion about it. The District Judge has relied on A.I.R. 1935 Lah. 909,¹ a decision by Abdul Rashid J. This is what the learned Judge held :

1. ('35) 22 A.I.R. 1935 Lah. 909 : 161 I. C. 484, *Mirza Faridun Beg v. Emperor.*

"Before the order of the trial Court regarding the sufficiency or insufficiency of the stamp can be made the subject-matter of consideration by the appellate Court for the purpose of making a declaration, such an order must have real existence. An order by implication cannot be taken into consideration by an appellate Court and cannot validly form the subject-matter of consideration for the purpose of issuing a declaration."

Different view, however, was taken by Addison J. in Civil Ref. No. 2 of 1938 and he held that the trial Judge's taking the document amounted to an order admitting the document. There are also observations in 11 Lah. 77² which are consistent with Addison J.'s view. No doubt the section with which the Judges were concerned in that case was S. 36, Stamp Act, and not S. 61, but I venture to think that the following remarks appearing at p. 79 of the printed report would be applicable even to a declaration sought under S. 61 :

"It was urged before the learned Judge, from whose judgment this appeal has been preferred under Cl. 10 of the Letters Patent, that there is no order of the Court admitting the document, but it is nowhere laid down that a document cannot be treated as admitted in evidence unless there is a separate written order deciding the admissibility of the document."

It appears that the attention of Abdul Rashid J. was not drawn to this case. I would, therefore, suggest that the case be laid before the Hon'ble the Chief Justice for reference to a larger Bench.

Judgment of Division Bench

Abdul Rashid Ag. C. J.—The Stamp Auditor made a report to the Collector, Montgomery, that two documents had been admitted in evidence in a certain case, though they were not sufficiently stamped. He suggested to the Collector that action should be taken in respect of these documents under S. 61, Stamp Act. The Collector Montgomery sent a copy of the inspection note of the Auditor with the relevant papers to the learned District Judge of Montgomery for necessary action under S. 61. The learned District Judge held that S. 61, Stamp Act, was inapplicable in the case of the documents in question as no order had been made by the trial Court admitting the documents in evidence. He, therefore, rejected the application of the Collector with costs. Against this decision a petition for revision has been preferred to this Court. This petition for revision, in the first instance, was heard by Teja Singh J. The learned Judge appeared to be of the

2. ('29) 16 A. I. R. 1929 Lah. 770 : 11 Lah. 77 : 119 I. C. 485, *Gurdas Mal Ramchand v. Guran-dutta Mal.*

opinion that it was unnecessary for the Court to pass a specific order admitting the documents in evidence and that the reception of the documents by the trial Court amounted to admission. But as, according to him, there was a conflict of opinion on the point in this Court he referred this petition for revision for decision to a Division Bench. It was held by me sitting in Single Bench in A.I.R. 1935 Lah. 909¹ that

"before the order of the trial Court regarding the sufficiency or insufficiency of the stamp can be made the subject matter of consideration by the appellate Court for the purpose of making a declaration, such an order must have real existence. An order by implication cannot be taken into consideration by an appellate Court and cannot validly form the subject-matter of consideration for the purpose of issuing a declaration."

It was urged by the learned Advocate-General that the admission of a document in evidence amounts to an implied order by the trial Court that the document is sufficiently stamped. Such an implied order can be made the subject-matter of revision under S. 61, Stamp Act. It has been enacted by S. 61 that

"when any Court makes any order admitting any instrument in evidence as duly stamped or as not requiring a stamp, or upon payment of duty and a penalty under S. 35, the Court to which appeals lie from, or references are made by, such first-mentioned Court may, of its own motion or on the application of the Collector, take such order into consideration."

It is obvious that the making of an order by the trial Court has been made obligatory as the order of the trial Court is to be the subject-matter of revision. The revising Court must see the order made by the trial Court and the reasons given therefor before affirming or modifying it. The word "order" has been defined in S. 2 (14), Civil P. C., as "the formal expression of any decision of a civil Court which is not a decree." In my opinion, the words "making an order" make it perfectly clear that there must be a formal expression of opinion by the Court and only that formal expression of opinion can be regarded as "making an order." The words "making an order" cannot be taken to have been used loosely in a fiscal enactment, as was contended for on behalf of the Crown. The case reported in 11 Lah. 77² deals with S. 36, Stamp Act. The language of S. 36, Stamp Act, is materially different from the language of S. 61. The words "order" or "making an order" have not been used anywhere in S. 36. Cases dealing with the interpretation of S. 36, Stamp Act, can, therefore, be of no assistance in the determination of the question now under consi-

deration. A fiscal enactment must be strictly construed and no order should be made to the detriment of the subject unless the words of the fiscal enactment clearly make the subject liable. If there is any doubt, as to whether any additional stamp duty or penalty is or is not chargeable in respect of a document, the decision must be in favour of the subject. For the reasons given above I would affirm the decision of the learned District Judge and dismiss this petition for revision with costs.

Mahajan J. — I agree.

v.R.

Revision dismissed.

[Case No. 49.]

A. I. R. (33) 1946 Lahore 266

ABDUR RAHMAN J.

Sant Singh and another — Petitioners
v.

Rattan Singh and others—Respondents.

Civil Revn. Case No. 65 of 1945, Decided on 19th October 1945, from decree of Senior Sub-Judge, Jhelum, D/- 11th October 1944.

Civil P. C. (1908), O. 3, R. 4 (2)—Power-of-attorney can be revoked wholly or partially only by writing and with leave of Court.

The provisions of O. 3, R. 4 (2) are quite clear and do not permit a Court to assume the power-of-attorney to have been revoked either wholly or partially unless it was done in writing and with the leave of Court. The words 'shall be deemed' leave no option and the Court is bound to regard the power-of-attorney to be in force until it has been brought to an end in the manner provided by the sub-rule. [P 267 C 1]

Thus, where a counsel for the plaintiffs signed a reference to arbitration in spite of one of the plaintiffs declining to do so, held that the counsel acted within his authority as the power to refer to arbitration was not revoked in the manner provided by the sub-rule. [P 267 C 2]

C. P. C. —

('44) Chitale, O. 3, R. 4, N. 16.

('41) Mulla, Page 555 Note 'Until determined with leave of Court.'

Gurdev Singh — for Petitioners.

Manohar Lal Mehra for P. N. Kaul and
H. L. Soni for Charan Dass — for Respondents.

Order.—This is a revision from an order of the Senior Subordinate Judge at Jhelum affirming the decision of the trial Court dismissing the plaintiffs' objections to an award and passing a decree in accordance with the same. One of the main objections taken on behalf of the plaintiffs was that, although one of the plaintiffs was present in Court and had declined to sign the reference to arbitration, the counsel appearing on his behalf and on behalf of the other plaintiffs nevertheless signed the reference

on behalf of all the plaintiffs and that, in the circumstances, the deed of reference was invalid. The fact that Ram Labhaya was present in Court along with Charan Dass plaintiff need not be doubted as Pandit Nanak Chand, who was appearing for the plaintiffs in the case had admitted this in his statement, dated 6th February 1943, which he gave on behalf of the plaintiffs. He had also stated that Ram Labhaya had declined to sign the deed of reference, but that he had done so as he was assured by Charan Dass plaintiff that Ram Labhaya would be subsequently persuaded to agree to the reference to arbitration. Ram Labhaya's presence was, however, not recorded in Court; and it seems that he was not in the court-room although he may have been outside it.

Learned counsel for the petitioners has contended that in view of the statement made by Pandit Nanak Chand, the express authority to refer to arbitration contained in the power-of-attorney must be found to have been revoked by Ram Labhaya and Pandit Nanak Chand could not have, therefore, validly made a reference on his behalf. It is unnecessary for me in this case to go into Pandit Nanak Chand's conduct, or to say whether he had by signing the deed of reference laid himself open to a charge of professional misconduct as the lower appellate Court seems to have thought, or to a liability to a civil action brought by Ram Labhaya, subsequently, as the provisions of O. 3, R. 4 (2), Civil P. C., are, in my opinion, quite clear and do not permit a Court to assume the power to have been revoked unless it was done in writing and with the leave of the Court. Sub-cl. (2) of R. 4 reads as follows:

"Every such appointment (authorizing a pleader to act on behalf of his client in Court) shall be filed in Court and shall be deemed to be in force until determined with the leave of the Court by a writing signed by the client or the pleader, as the case may be, and filed in Court, or until the client or the pleader dies, or until all proceedings in the suit are ended so far as regards the client."

Unless, therefore, the form was determined with the leave of the Court by a writing signed by the client, it must be held to have remained in force. The words "shall be deemed" leave no option and the Court is bound to regard the power-of-attorney to be in force until it has been brought to an end in the manner provided by the sub-clause. It is admitted that the power-of-attorney had not been revoked in the manner provided in the sub-clause, but it was urged that the provisions of sub-cl. (2)

were not applicable as the client had not withdrawn the whole of the power-of-attorney but by declining to sign the reference himself, he must be deemed to have revoked one of the powers which had authorised Pandit Nanak Chand to refer a dispute to arbitration. I cannot accept that contention, for a power-of-attorney can be, in my view, revoked either wholly or partially only in the manner prescribed by this sub-clause and not otherwise. Since the power to refer to arbitration had not been validly revoked, it has to be deemed to have remained in force; and Pandit Nanak Chand must accordingly be deemed to have had power to refer the matter to arbitration on behalf of his clients, as provided for in the power-of-attorney given by them. I would, for the above reasons, hold that the plaintiffs' objections on that score were rightly disallowed. The revision accordingly fails and is dismissed, but I would make no order as to costs.

K.S.

Order accordingly.

[Case No. 50.]

A. I. R. (33) 1946 Lahore 267

ABDUR RAHMAN J.

Raja Shah and another — Judgment-debtors — Appellants

v.

Firm Thakar Das Sainditta Mal — Decree-holders — Respondents.

Second Appeal No. 1693 of 1944, Decided on 12th November 1945, from order of the District Judge, Lyallpur, D/- 24th August 1944.

(a) Punjab Relief of Indebtedness Act (7 [VII] of 1934), Ss. 20 and 21 (b)—One of judgment-debtors applying for conciliation and obtaining certificate under S. 20—Other judgment-debtor not party to proceeding—Decree-holder's right to proceed against latter judgment-debtor is not taken away.

A judgment-debtor who is not a party to the proceeding before the Debt Conciliation Board cannot take advantage of an order granting a certificate under S. 20, passed in favour of his joint judgment-debtor. In such a case, the decree becomes inexecutable not as a whole but *qua* the judgment-debtor in whose favour the order is passed. The decree-holder's right to proceed against the other judgment-debtor is not taken away. [P 268 C 1]

(b) Civil P. C. (1908), S. 60, Proviso—Agriculturist—Cultivation of insignificant area.

The cultivation of an insignificant area by the judgment-debtor is insufficient to establish that he was an agriculturist. [P 268 C 2]

C. P. C. —

(44) Chitale, S. 60, N. 10, Pt. (7).

(41) Mulla, Page 243, Pt. (t).

Shuja-ud-Din — for Appellants.

Prem Chand Pandit — for Respondents.

Judgment. — A decree for money was passed against Ghulam Hussain and Raja Shah jointly on 31st January 1934. The decree-holder made an application for execution on 7th June 1935 and secured the attachment of the house in dispute. Raja Shah, one of the judgment-debtors, then applied to the Debt Conciliation Board for conciliation. Ghulam Hussain, it must be remembered, was no party to these proceedings. As the parties before the Board could not arrive at any amicable settlement a certificate was granted to Raja Shah alone, according to which the execution of the decree was postponed till the other creditors of Raja Shah were satisfied (Ex. D/1). As there was no mention of Ghulam Hussain in this certificate, an application was made by the decree-holder to execute the decree against Ghulam Hussain. To this Ghulam Hussain objected and urged that the decree could not be executed as a whole in view of the words of s. 21 (b), Punjab Relief of Indebtedness Act. The second objection was that the house was exempt from attachment under s. 60, Civil P. C., as the judgment-debtors were agriculturists. The execution Court found in favour of the judgment-debtors on both of these points and dismissed the execution application. On appeal, however, the District Judge, Lyallpur, came to a contrary decision and allowed the appeal. The judgment-debtors have come up in second appeal.

It must be admitted that the words in s. 21 (b) of the Act are rather general but they cannot be taken to mean that the order of the Board could even bind those who were no parties before it. It was not an order *in rem*. Ghulam Hussain had not applied for conciliation. He was not a party to the proceedings and could not, therefore, take advantage of an order which had been passed in favour of his joint judgment-debtor Raja Shah. The obvious interpretation of that sub-clause is that the decree would be inexecutable not as a whole but *qua* the person who had applied to the Debt Conciliation Board and had succeeded in persuading the Board to grant a certificate to him. The decree-holder's right to proceed against the other judgment-debtor could not be held to have been taken away against the person who had not taken the trouble to make an application or even to appear before the Board. I would, therefore, agree with the lower appellate Court that his decision on that point was right.

As to the other contention it was not shown by the judgment-debtors that they were personally engaging themselves in the tilling of the soil and that their livelihood depended upon the proceeds of such tilling. They did produce Ex. D/2 but that shows that they had tilled an area of three-quarter of a *kanal* in Kharif 1930 and Rabi 1931 and $2\frac{1}{2}$ *kanals* in Kharif 1931 and 2 *kanals* in Rabi 1932. The cultivation of such an insignificant area could not possibly be of use to the judgment-debtors in establishing that they were 'agriculturists.' I must, therefore, agree that the decision of the lower appellate Court on the second point was also correct. For the above reasons the appeal fails and is dismissed with costs.

V.B.

Appeal dismissed.

[Case No. 51.]

A. I. R. (33) 1946 Lahore 268

BECKETT AND TEJA SINGH JJ.

Mt. Qaisar Jahan Begum and another
—Plaintiffs—Appellants
v.

Court of Wards, Delhi, through Deputy Commissioner, Delhi and others — Defendants—Respondents.

First Appeal No. 26 of 1942, Decided on 13th November 1944, from order of Sub-Judge, 1st Class, Delhi, D/- 27th August 1941.

(a) Pensions Act (1871), S. 4—Grant of land revenue, what amounts to—Court has to look at substance of what has been granted.

The fact that jagirs were generally heritable and alienable and the rights of the jagirdars were generally treated as a form of land tenure, a sort of superior ownership, is not itself sufficient to take the land revenue levied on land so held out of the scope of S. 4. In order to determine whether a grant amounts to a grant of land revenue within the meaning of that section the Court has to look at the substance of what has been granted or continued by Government, whatever may be the purely legal view as to the nature of the right granted, and if the grant consists merely in the right to collect the land revenue, at any rate in the time of the British Government, or if it included this right in addition to other rights as well, then what the Court has to see is whether that right to collect the land revenue comes within the provisions of the Pensions Act or not.

[P 270 C 1, 2]

(b) Pensions Act (1871), S. 9—Section shows that Act applies to right to collect land revenue for oneself.

Section 9 which provides that nothing in Ss. 4 and 8 shall affect the right of a grantee of land revenue to collect the revenue for himself clearly shows that the right to collect land revenue for oneself was regarded in the scheme of the Act as a grant of land revenue. It cannot, therefore, be said that the Pensions Act applies only to revenue which is first collected by Government and then paid out from the treasury to the jagirdar.

[P 270 C 2]

(c) Pensions Act (1871), S. 4—Grant of land revenue does not cease to be so by grantee becoming owner of land.

A grant of land revenue does not cease to be such a grant when the grantee becomes himself the owner of the land over which the grant extends. The liability of a particular person to pay land revenue must not be confused with a liability which has been imposed upon the land itself. What has to be seen is whether the land itself has, at any time, been made exempt from revenue: (25) 12 AIR 1925 All. 565, *Rel. on.* [P 270 C 2]

(d) Pensions Act (1871), S. 4—Nature of right replaced by grant not to be considered.

According to S. 4 regard is not to be had to the nature of the right for which a grant has been substituted. [P 271 C 1]

A. N. Grover — for Appellants.

Bishan Narain — for Respondents 1 to 4.

Beckett J.—The facts of this case have already been fully set out in the order of this Court, dated 2nd November 1943, which should be read as part of this judgment. The suit relates to the estate left by a descendant of the Mughal Emperors of Delhi. The previous order disposed of all the disputed items except one. The previous owner of the estate under partition held certain lands on which no land revenue was being paid to Government. While the estate was under the administration of the Court of Wards, the revenue to which the land was assessed was treated by book entry as if it had been paid and was then credited back to the estate but under a separate heading as "Jagir income." These lands were also valued for purposes of partition as revenue-paying land, whereas those villages which were exempt from land revenue were given an enhanced value. It was contended by counsel for the appellants that the sum treated as "Jagir income" by the Court of Wards included items which should not have been so treated, and in particular that land revenue had been deducted from the income of property which was exempt from its payment. In respect of such property, it was contended, the appellants were entitled to share in the whole of the produce, without any deduction. It was also contended that, in respect of such property, the appellants were entitled to share in the enhanced value that would arise if these lands were treated as exempt from revenue instead of as revenue-paying. It was held at the previous hearing that a distinction must be drawn between land exempt from revenue, which is usually described as "Muafi," and land on which the revenue has been assigned by Government to some one else, which land, or the right to collect the revenue on it, is usually described as a

jagir; but the two terms are often confused in practice, and in the present case, in which a very large number of points of detail had arisen, it appeared that sufficient attention had not been paid to the proper classification of part of the property involved from this point of view. The case was accordingly remanded for a report on the following issues: (1) Are Aghwanpur and Ladha Sarai *muafis*? If so, of what kind? (2) If it be found that the *muafis* merely amount to grant of revenue-free lands could not the civil Court grant any relief with respect to them? (3) If the *muafis* are proved to amount to remission or grant of land revenue what is the effect of it upon the Court's power to partition it?

This report has now been received and objections to it have been put in by the appellants against whom the issues have been decided. The report of the learned Subordinate Judge is quite clear, and is based on the entries in the land revenue records. The village of Aghwanpur was originally held in Jagir. The Jagir was forfeited but was again released in favour of the original holder on the same terms as before. The records show that at one time the holder of the Jagir was not recorded as the owner of any land in the village. There was an agreement that persons shown as owners should pay the land revenue direct to the Jagirdar. Subsequently, by degrees, the Jagirdar himself came to be recorded as owner by purchase of part of the land in the village and eventually came to be recorded as owner of all the land in the village, possession being taken over from the persons recorded as owners. This would, of course, mean that in practice no payment of the land revenue would actually be made, but the learned Senior Subordinate Judge has held that this does not affect the legal position. In other words, the land does not become exempt from land revenue, and the Jagir still remains in the sense of an assignment of the land revenue. Section 4, Pensions Act, provides that no civil Court shall entertain any suit relating to any grant of land revenue conferred or made by the British or any former Government, except as provided elsewhere in the Act.

The original owner of the estate under partition was given an assignment of the land revenue from Ladha Sarai in compensation for a Jagir held elsewhere, over land which had been acquired by Government. Whatever the position might have been with regard to the original Jagir, the

learned Senior Subordinate Judge has held that the position has been made perfectly clear by the terms of the grant in Ladha Sarai. Although the recipient of the grant held land in Ladha Sarai, he did not own the whole of it, the grant was greater than the land revenue to which his own land was liable and the balance is made up out of land revenue received from other owners in the village. It has been found that this is clearly a grant of land revenue and equally protected by S. 4, Pensions Act.

In attacking these findings, Mr. Grover for the appellants has put forward a two-fold contention. In the first place, he contends that although the Aghwanpur grant may originally have been termed a Jagir, it would still not be covered by the terms of S. 4, Pensions Act, when regard is had to the peculiar terms on which Jagirs round Delhi were held. In the second place, even if there was a grant of land revenue in the first instance, he claims that this came to an end and that the land became exempt from revenue when the Jagirdar became full owner of the village. The first of these contentions is based on the way the Jagir has been treated and described in various documents in the past, and more particularly in two conveyances, in one of which a mortgagee of the Jagir reconveyed his rights to the Jagirdar and in the second of which the Jagirdar mortgaged his rights with the Secretary of State for India in Council. In the former, which is P. S./15, it is recited that Mauza Aghwanpur, a Jagir village, is the *muafi* estate of the then Jagirdar, and when the mortgagee is mentioned as holding the *muafi*, it is clear that he is treated as holding the village itself, since he is described as selling it in the state in which it is at present held by him. In the second conveyance, which is Ex. D. I/15, it is stated that the mortgagor, that is, the Jagirdar

"is seized in full proprietary rights in possession free from incumbrance of the lands and hereditaments hereinafter described and conveyed"

and in the schedule Aghwanpur is given. I have seen a number of these conveyances relating to old Jagirs round Delhi, which were generally heritable and alienable, and it is true that the rights of the Jagirdars were generally treated as a form of land tenure, a sort of superior ownership. It does not, however, seem to me that this is sufficient to support Mr. Grover's argument and to take the land revenue levied on land so held (during any period while the

land revenue is being paid by persons other than the Jagirdars who are recorded in the revenue records as owners) out of the scope of S. 4, Pensions Act. We have to look at the substance of what has been granted or continued by Government, whatever may be the purely legal view as to the nature of the right granted and if the grant consists merely in the right to collect the land revenue, at any rate in the time of the British Government, or if it included this right in addition to other rights as well, then what we have to see is whether that right to collect the land revenue comes within the provisions of the Pensions Act or not.

In the present instance, it is plain that land revenue was being collected from the owners of the village and was being paid to the Jagirdar. This appears both from the fact that persons other than the Jagirdars were shown in the revenue records as owners of the village (and it is from such people that the land revenue is collected), and also from a footnote to the *Shajra Nasab*, Ex. D-274, to the effect that the Jagirdar at one stage had been granted the right to collect the land revenue of the village. All that Mr. Grover's argument then comes down to is this that a distinction should be drawn between a grant of land revenue and the right to collect land revenue and Mr. Grover contends that the Pensions Act should be made to apply only to revenue which is first collected by Government and then paid out from the Treasury to the Jagirdar. But S. 9 of the Act, which provides that nothing in Ss. 4 and 8 shall affect the right of a grantee of land revenue to collect the revenue for himself, seems clearly to show that the right to collect land revenue for oneself was regarded in the scheme of the Act as a grant of land revenue.

We are thus left with Mr. Grover's second argument which is that a grant of land revenue ceases to be such a grant when the grantee becomes himself the owner of the land over which grant extends. It seems to me that this argument is based on a confusion between the liability of a particular person to pay land revenue and a liability which has been imposed upon the land itself. What has to be seen is whether the land itself has at any time been made exempt from revenue. Not all grants of land revenue are heritable and partible so that on a devolution the land may go to one person, while the assignment of land revenue may go to another. It seems clear that one of the parties to such an assignment

cannot alter its nature and make the land henceforward revenue-free by a unilateral act. Mr. Grover admits that this would be the position if the assignment had, for example, been governed by the rule of primogeniture but he contends that in the present instance previous dealings would show that the Jagir was both heritable and partible. It does not seem to me, however, that the question whether there is a sort of merger, and whether the land becomes revenue-free when the Jagirdar purchases the rights of an owner, can thus be made to depend upon the nature of the Jagir. I am supported in this view by a decision of a Division Bench of the Allahabad High Court reported in 47 ALL. 557,¹ with which I respectfully agree.

If this is position in regard to the Aghwanpur estate, then the position in regard to the Ladha Sarai Jagir is still more clear. The terms of the present grant, which was made in 1915, can be seen from Ex. D. 2/160. This is a fixed cash payment to be made out of the revenues of a particular estate, which was not wholly owned by the grantee. According to S. 4, Pensions Act, regard is not to be had to the nature of the right for which a grant has been substituted; but even if this were done, the position of the appellants would admittedly be no better than it

is with regard to the Aghwanpur estate. For these reasons, I agree with the findings contained in the report of the learned Senior Subordinate Judge, and these are sufficient to dispose of the greater part of the claim put forward by the appellants. There are, however, certain other items such as items relating to revenue-free lands, which have been incorrectly classified as coming under the head of "Jagir income." In respect of these, it is admitted that the appellants are entitled to an additional sum of Rs. 700 excluded from the deductions made by the Court of Wards. An objection was raised with regard to the court-fee paid by the appellants in appeal, but the amount found due is considerably less than the amount on which court-fee is assessed and the objection has not been pressed.

As regards the mode of partition, which will now have to be recorded, it has been agreed between the parties without prejudice to their right of appeal with regard to the findings on which the partition is now to be based, that partition should take place in the following manner. It is agreed that the plaintiffs-appellants Qaisar Jahan Bagum and Tamur Jahan Begum should be given the following properties valued as under and that the balance due to them may be paid in cash.

(1) Chandni Mahal valued at	...	...	Rs. 80,000	
(2) Haveli Sadr-ul-Sadar valued at	...	...	Rs. 12,000	with Bagicha.
(3) Village Nasirpura in Gurgaon district valued at	...	...	Rs. 3,200	
(4) Village Sadarpur in district Gurgaon valued at	...	...	Rs. 1,000	
Total			Rs. 96,200.	

The total amount which falls due to the appellants works out as follows :

Amount found to have been wrongly debited to the estate of Salim Mohammad Shah	...	(1) Rs. 12,903-9-2 (2) Rs. 34,980-6-3 (3) Rs. 4,679-13-6	(Compensatory allowance). (Regarding mortgage debt of Suriya Jat). (Funeral expenses Rs. 875).
		Rs. 52,563-12-11	Only being found payable by the heirs of Salim Mohammad Shah.
Amount which ought to have been credited to the estate of Salim Mohammad Shah.	...	Rs. 700-0-0	(On account of the income from Jagir villages.)
	Total	Rs. 53,263-12-11	
The amount by which the figure arrived at by the trial Court relating to the appellants is to be increased, their share being 5/8ths in the estate of Salim Mohammad Shah.	...	Rs. 33,289-14-0	(being 5/8ths of Rupees 53,263-12-11.)
The figure arrived at by the trial Court regarding the share of the appellants.	...	Rs. 63,289-0-0	
Total amount which falls to the share of the appellants Qaisar Jahan Begum and Temur Jahan Begum.	...	Rs. 96,584-14-0	

1. (25) 12 A.I.R. 1925 All. 565 : 47 All. 557 : 87 I. C. 569, Lalla Babu v. Lal Bahadur.

This leaves a balance of Rs. 384-14-0 due after allowing for the immovable property which is being handed over. I would, therefore, allow the appeal and in place of the decree awarded by the trial Court I would grant the plaintiffs-appellants a decree for possession of the properties named immediately above, and for the recovery of a sum of Rs. 384-14-0 from the Court of Wards. I would leave the parties to bear their own costs in the Court below and I would allow the appellants proportionate costs in this Court.

Teja Singh J. — I agree.

D.H. *Appeal allowed.*

[Case No. 52.]

A. I. R. (33) 1946 Lahore 272

ABDUR RAHMAN J.

Ram Sarup — Plaintiff — Appellant
v.

Mt. Jai Devi and others—Defendants
—Respondents.

Second Appeal No. 1771 of 1943, Decided on 21st November 1945, from decree of Dist. Judge, Gurgaon at Hissar, D/- 24th June 1943.

(a) Punjab Limitation (Customs) Act (1 [I] of 1920), Art. 6—Starting point—Mutation effected in favour of Hindu widow despite objection by alleged adopted son — Adopted son failing to file suit within six years—Widow remarrying and effecting transfer in favour of landlord — Adopted son held had fresh cause of action on remarriage of widow and limitation starts from that date.

K, a Hindu, was an occupancy tenant of certain land. K died in 1929. On his death mutation was effected in 1930 in favour of J, widow of predeceased son of K, despite the objection of plaintiff who claimed to be the adopted son of K, and in disregard of the provisions of S. 59, Punjab Tenancy Act. J remained in possession and plaintiff did not take any steps to assert his rights. J remarried in 1938 or 1939 and then transferred the rights to the defendants landlords and mutation was effected in favour of landlords in September 1939. Within a year of this plaintiff filed the present suit for recovery of possession:

Held that the effect of the decision in mutation proceedings in 1930 was not that the occupancy rights were extinguished but that the plaintiff's rights were, although wrongly, postponed to that of J. J came to possess them as she might have come to possess any other immovable property left by K and had only a limited interest in them during her lifetime or till her re-marriage. On J's re-marriage her rights ceased to exist and a fresh cause of action accrued to the plaintiff when the mutation was effected in favour of the landlords. As the suit was instituted within a year of the transfer to the landlords it was not barred by limitation under Art. 6. [P 274 C 1, 2; P 275 C 1]

(b) Punjab Custom (Power to Contest) Act (2 [II] of 1920), S. 6—Scope of—Nature of bar of right to contest, stated.

The right to contest has been taken away from persons other than those mentioned in S. 6 only to the extent that they would not be able to contest an alienation of ancestral immovable property or an appointment of an heir on the ground that such an alienation or appointment is contrary to custom. The right to contest an appointment of heir or alienation on other grounds has not been taken away by the section, with the result that all other pleas including that of limitation are still available to a party regardless of the fact whether he falls within the category of persons mentioned in S. 6 of the Act. [P 273 C 2]

(c) Punjab Limitation (Customs) Act (1 [I] of 1920)—Scope of—Provisions in schedule not to be read subject to provisions of Act 2 [II] of 1920.

Provisions of the various articles contained in the schedule to the Act are not to be read subject to the provisions contained in Punjab Custom (Power to Contest) Act, 2 [II] of 1920. [P 273 C 2]

(d) Punjab Limitation (Customs) Act (1 [I] of 1920), Art. 6—Ancestral property — Meaning of.

The word ancestral property has not been defined in the Act and in the absence of any definition the ordinary dictionary meaning is to be given to it. If the rights on the basis of which the plaintiff was bringing the suit happened to belong to his father, they would be ancestral *qua* him and would, therefore, come within the ambit of Col. 1 of Art. 6. [P 274 C 1]

(e) Punjab Limitation (Customs) Act (1 [I] of 1920), Art. 6 — Applicability — Article applies to plaintiffs and not to defendants—Defendant not to prove ancestral nature of property.

If Art. 6 has to be applied, the property must be found to be ancestral property before the provisions of the article can be attracted. Obviously the article can apply only to plaintiffs and not to defendants. Therefore, it cannot be contended that the article will not apply as long as the property was not proved to have been the ancestral property of the defendant. [P 274 C 1]

(f) Custom (Punjab)—Adoption—Daughter's son—Adoption of, sanctioned by custom in the district of the old Delhi—Hindu law.

Adoption of a daughter's son though not permissible under strict Hindu law is valid under custom in the districts of the old Delhi territory and if established, has the effect of a valid adoption under the Hindu law : ('31) 18 A. I. R. 1931 Lah. 546 and ('20) 7 A. I. R. 1920 Lah. 284, *Rel. on*. [P 275 C 1]

(g) Civil P. C. (1908), S. 100 — New plea — Plea not taken in Courts below cannot be allowed to be taken for the first time in second appeal.

K was an occupancy tenant of certain land. He died in 1929 and mutation was effected in 1930 in favour of J, widow of predeceased son of K despite the objection of plaintiff who claimed to be the adopted son of K and in disregard of the provisions of S. 59, Punjab Tenancy Act. In second appeal it was contended by the defendant that a new tenancy had been created after the mutation was effected in favour of J in 1930 and that the landlord had consented to permit J to continue as a tenant :

Held that no such plea having been advanced by the defendant in the Courts below could not be permitted to be taken for the first time in second appeal. [P 274 C 2]

C. P. C. —

('44) Chitale, S. 100, N. 55.

('41) Mulla, Page 374.

Asa Ram Aggarwal — for Appellant.

Divarka Nath Aggarwal — for Respondents.

Judgment. — This appeal arises out of a suit for recovery of possession of occupancy rights in certain lands which were transferred to the landlord defendants (defendants 2 to 8) in September 1939. The facts which led to this suit were that one Kallu was an occupancy tenant of these lands under S. 6, Punjab Tenancy Act. He died early in 1929. The plaintiff claimed to be his adopted son and asked for a mutation of these rights to be effected in his favour. This was opposed by Mt. Jaidei, the widow of a predeceased son of Kallu. The plaintiff's right was not recognized by the revenue authorities and the mutation was ordered to be effected in favour of Mt. Jaidei on 17th December 1930 (Ex. P-4). This could not have been done in face of the clear provisions of S. 59, Punjab Tenancy Act. But it was and the plaintiff took no steps to have the mistake rectified. It might be mentioned here, however, that the landlord respondents (defendants 2 to 8) were not parties to this dispute between Mt. Jaidei and Ram Sarup plaintiff. Mt. Jaidei remarried in 1938 or 1939, and mutation was effected in favour of the landlords on 29th September 1939 in spite of the plaintiff's opposition. The plaintiff thereupon brought the suit out of which the present appeal arises on 21st May 1940 for the recovery of possession of the occupancy rights (subject to the mortgage which had been executed by Kallu during his lifetime), as well as for a declaration that he was entitled to recover this property as an adopted son and that the occupancy rights had not been extinguished under S. 59, Punjab Tenancy Act. Holding that the plaintiff's allegation to the effect that he had been adopted by Kallu amounted to an allegation by the former of his having been appointed as an heir under the customary law, his suit was dismissed by the trial Court and by the Court of First Appeal. The plaintiff came up to this Court and the suit was ordered to be remanded by Abdul Rashid J. (Regular Second Appeal No. 1112 of 1941) on 26th May 1942 for recording evidence on the points whether the plaintiff had been adopted under the Hindu law and whether the suit was in respect of ancestral property. This was so ordered as an adopted son under the Hindu law had been held by this Court to fall within the meaning of the ex-

pression 'male lineal descendant' used in S. 59, Punjab Tenancy Act, and as the applicability of Art. 6 in the Schedule to the Punjab Limitation (Customs) Act (1 [I] of 1920) depended amongst other things on the fact whether the suit was in respect of ancestral property.

The trial Court came to the conclusion after remand that the plaintiff had been adopted under the Hindu law, but dismissed the suit on the ground of limitation. On appeal the District Judge of Hissar confirmed the decision of the trial Court on the question of limitation, although it appears from his judgment that he lost sight of the distinction between an adoption under the Hindu law and an appointment of heir under the customary law of the Punjab. The plaintiff has preferred this appeal. Learned counsel for the appellant first of all contended that inasmuch as no person other than a male lineal descendant of the great grandfather of the person making the appointment of heir was entitled to contest such an appointment either as a plaintiff or as a defendant under Punjab Custom (Power to contest) Act 2 [II] of 1920, the present defendants, being strangers, had no right to contest the suit on the ground of limitation. It was also urged that the provisions of the various articles contained in the schedule to the Punjab Act 1 [I] of 1920 had to be read subject to the provisions contained in Act 2 [II] of 1920. I cannot accept either of these contentions, for the right to contest has been taken away from persons other than those mentioned in S. 6 of Act 2 [II] of 1920 only to the extent that they would not be able to contest the alienation of ancestral immovable property or the appointment of an heir on the ground that such an alienation or appointment were contrary to custom. The right to contest an appointment of heir or alienation on other grounds has not been taken away by that section with the result that all other pleas including that of limitation are still available to a party regardless of the fact whether he falls within the category of persons mentioned in S. 6 of Act 2 [II] of 1920 or not. Nor can I accept the contention that the provisions of the schedule to Act 1 [I] of 1920 have to be read along with the provisions of Act 2 [II] of 1920, or that Act 1 [I] of 1920 would have no application where Act 2 [II] of 1920 has no application. My attention has been drawn to nothing in either of these two Acts which would compel me to read or import the provisions of one Act into the other.

It was also contended by learned counsel for the appellant that the property in regard to which the suit was brought was not ancestral within the meaning of that word as used in Art. 6, Punjab Limitation (Customs) Act, and that it could not be applied as long as the property was not proved to have been the ancestral property of the defendants. But that word has not been defined by that Act and in the absence of any definition, I can only give to it its ordinary dictionary meaning. If the rights on the basis of which the plaintiff was bringing the suit happened to belong to his father, they would be ancestral *qua* him and would therefore, come within the ambit of the first column of Art. 6, Punjab Limitation (Customs) Act. It is quite true that if the defendants had brought the suit, they would have had to allege and prove that the property was ancestral in character. This cannot, however, help the plaintiff. If Art. 6 has to be applied, and it can only apply to plaintiffs and not to defendants, the property must be found to be ancestral property before the provisions of Art. 6 can be attracted or applied. I would, therefore, hold that the article is not inapplicable merely because the property in suit was not proved to have been the defendants' ancestral property. It was in the end contended that at all events the plaintiff's suit was not barred by limitation as his rights as an heir to Kallu were never interfered with by the defendants, the landlords, before 1939 and he had brought the suit within an year of the mutation effected in their favour. Learned counsel for the respondents on the other hand contended that in so far as the mutation had been effected in favour of Mt. Jaidei in December 1930 and the plaintiff had failed to institute the suit within six years of that mutation, the suit would be barred by limitation regardless of the fact whether his clients had acquired subsequent rights in the property or not. The period of limitation, he urged, had once begun to run in 1930 and it could not cease to do so on account of a subsequent transfer to his clients. In order to decide this question, the decision arrived at in 1930 and its actual effect on the present plaintiff must be borne in mind. It is quite true that under S. 59, Punjab Tenancy Act, the occupancy rights could not have been inherited by any female, but it is obvious that the revenue authorities had disregarded the provisions of that section. It is inconceivable otherwise how the mutation could have been ordered in favour of Mt. Jaidei. The effect of that

decision was not that the occupancy rights were extinguished but that the plaintiff's right was, although wrongly, postponed to that of Mt. Jaidei who came to possess them as she might have come to possess any other immovable property left by Kallu. It cannot be disputed that Mt. Jaidei would have been a limited owner in respect of other immovable property under the Punjab Customary Law during her lifetime or up to the time of her remarriage and there is no reason to presume that she had any larger interest in the occupancy rights. The contention advanced by learned counsel for the respondents that a new tenancy had been created after the mutation was effected in Mt. Jaidei's favour in 1930 and that the landlord respondents had consented to permit Mt. Jaidei to continue as a tenant is not borne out by the record. No such contention had ever been advanced by the defendants and I cannot permit this position to be taken for the first time in second appeal. The argument was advanced because of S. 59, Punjab Tenancy Act, but the provisions of that section, as I have already observed, had been ignored by the revenue authorities.

No fresh tenancy can thus be held to have come into existence, and Mt. Jaidei must be deemed to have continued to occupy the occupancy rights in the land in suit as an heir of Kallu. Mt. Jaidei remarried in 1938 or 1939 and then agreed to transfer those rights to the landlord defendants in 1939 with the result that the mutation was sanctioned in their favour on 29th September 1939. As long as Mt. Jaidei had remained in possession, the plaintiff did not obviously mind the situation. He had probably decided to raise no further objection to Mt. Jaidei continuing to be in possession of the occupancy rights. But even if he had and allowed the statutory period of limitation to expire without bringing a suit as mentioned in Art. 6, Punjab Limitation (Customs) Act, against Mt. Jaidei after the mutation had been ordered in her favour he could not have recovered possession from her subsequently. This was the only effect of the decision of the revenue authorities coupled with the plaintiff's subsequent silence for six years. In other words, the plaintiff's right to be in possession of occupancy rights could not be enforced and was postponed for as long as Mt. Jaidei remained in possession and was entitled so to do. But when she remarried and transferred them to the defendant landlords and thus tried to extin-

guish them altogether, the position became an entirely different one. Had she been in possession of any other immovable property belonging to Kallu legally, his reversioners would have been entitled to oust her on her remarriage. And there is no reason why should the plaintiff not be able so to do on the assumption that he was Kallu's adopted son under the Hindu law and thus his nearest reversioner—being a lineal descendant within the meaning of S. 59, Punjab Tenancy Act. On Mt. Jaidei's remarriage her rights ceased to exist and the plaintiff's suit to recover them from the landlord respondents is based on a fresh cause of action which accrued to him on a mutation having been effected in their favour in 1939. As the suit was instituted within a year of the transfer to the defendant landlords, it cannot be held to have been barred by limitation under Art. 6, Punjab Limitation (Customs) Act.

Having disposed of the question of limitation in favour of the plaintiff, the next question to decide is whether the plaintiff had been adopted by Kallu under the Hindu law? The fact that he was a daughter's son would be no bar to a finding in his favour, as belonging to the districts of the old Delhi territory, his adoption, though not permissible under the strict Hindu law, would be valid under custom and would have, if established, the effect of a valid adoption under the Hindu law: 59 I. C. 82¹ and 13 Lah. 126.² The lower appellate Court did not, as I have observed before, draw any distinction between an adoption under the Hindu law and the appointment of an heir under the customary law, although Abdul Rashid J., had made it clear when the suit was being remanded by him for a fresh trial. The result is that in the absence of a definite finding by the lower appellate Court I am not in a position to dispose of this appeal finally this morning. I must call for a finding from the District Judge as to whether the plaintiff had succeeded in establishing that he was an adopted son of Kallu in the Hindu law sense—although as modified by custom to the extent that a daughter's son could be legally adopted in the place to which Kallu and the plaintiff belonged. The finding is to be submitted to this Court within three months. The parties would not be permitted to lead or to ask for opportunity to produce further evidence. The parties

are directed to appear before the District Judge on 12th December 1945 to get a suitable date for arguments.

G B.

Case remanded.

[Case No. 53.]

A. I. R. (33) 1946 Lahore 275

TEJA SINGH AND MOHAMMAD
SHARIF JJ.

Abdul Rahman s/o Ghola
Convict — Appellant

v.

Emperor.

Criminal Appeal No. 292 of 1945, Decided on 13th November 1945, from order of Sessions Judge, Multan, D/- 23rd February 1945.

(a) Penal Code (1860), Ss. 300, 302 and 304, Part I—Sudden quarrel — Deceased abusing accused and lifting up stick to strike—Accused giving him blow on head with *kulhari* and causing death—Accused is guilty under S. 304, Part I and not under S. 302.

Where there was a sudden quarrel about the cattle bells and the deceased abused the accused and lifted up his stick to strike when the accused gave him a blow on the head with his *kulhari* which caused his death :

Held that the deceased's going to strike with a stick did give a right of private defence to the accused, but he was not within his right to use the *kulhari* on the head with the force he did and which caused the death. The accused was, therefore, guilty under S. 304, Part I and not under Section 302. [P 277 C 1]

Penal Code —

(45) Ratanlal, P. 724, Note "Right of private defence exceeded" and P. 756 Note "Sudden quarrel."

(36) Gour, P. 1001, Para. 3331 and P. 1039, Para. 3458.

(b) Evidence Act (1872), S. 33—Applicability — Right and opportunity to cross-examine — Whether accused had opportunity is question of fact — Accused's mere physical presence at time of examination is not enough—Date given for examination — Accused denied chance to prepare for cross-examination — Section does not apply.

In order to apply S. 33, two things, right and opportunity to cross-examine, must co-exist. Even if the accused had the right to cross-examine, whether he had the opportunity to exercise his right, is a question of fact to be determined in each case. The condition will not be satisfied merely because the accused was physically present in police custody at the time of the examination of a witness. There must be something more than that. He should know that the witnesses would be produced and the time when and the place where they would be produced or could have known of it; but not where a witness is sprung upon him as a surprise. It is immaterial whether it is designed or accidental. The object of the section is to afford a genuine opportunity which could be effectively availed of and not for show only. Where all that is known is that a date would be given and is actually given for the examination of witnesses by the committing Magistrate but the accused is called

1. ('20) 7 A. I. R. 1920 Lah. 284 : 59 I. C. 82, *Giasu v. Hardial*.

2. ('31) 18 A. I. R. 1931 Lah. 546 : 13 Lah. 126 : 132 I. C. 481, *Raghibir Saran v. Ram Chander*.

again on the same date and the witnesses are examined and the accused is denied a chance to prepare for cross-examination, S. 33 has no application. [P 276 C 2; P 277 C 1]

L. Saunders — for Appellant.

A. G. Maurice and H. R. Mahajan for the Advocate General, Punjab—for the Crown.

Mohammad Sharif J. — This is an appeal against the order of the learned Sessions Judge, Multan, dated 23rd February 1945 by which he convicted the appellant under S. 302, Penal Code, for having caused the death of one Faizu and sentenced him to transportation for life. The case for the prosecution is that on the morning of 30th December 1944 the deceased, the appellant, Mira P. W. and Faqira were grazing their cattle in jungle of Rampore. Faizu deceased and Mira each had a stick. Faqira was empty-handed and the appellant carried a small *kulhari*. They were all sitting together and their cattle were roaming about. The appellant said to the deceased "give me back my bells." The deceased replied "I will give them back if you give me my bells which you took last year." The appellant then said "I shall go and look after my buffaloes," but suddenly he struck a *kulhari* blow on the head of the deceased. The others got up and the appellant ran away leaving his *kulhari* struck in the head which was later pulled out by Mira P. W. The occurrence was witnessed by Faqira and Mira. Faqira made a statement in the Court of the Committing Magistrate but died a few days later and his statement was admitted in the Court of the Sessions Judge under S. 33, Evidence Act. For the reasons which shall be given presently, his statement was wrongly admitted. We are thus left with the deposition of Mira P. W. 3. Leaving Faqira behind with the deceased, Mira P. W. carried information to Mt. Karam Khatun, the sister of the deceased, and she came along to the spot. There is nothing to be said against Mira and his account of the occurrence may be taken to be substantially correct. But in one important respect Mira is contradicted by Mt. Karam Khatun who was later examined as C. W. 1. Mt. Karam Khatun was told by Mira P. W. that there was a quarrel about the cattle bells and her brother had abused the appellant and lifted up his stick to strike when the appellant gave him a blow with his *kulhari*.

The deceased was then taken to the hospital and admitted as an indoor patient at 7.5 P. M. He had one incised wound 4" x 1", bone deep, with a cut in parietal bone in

the corresponding length and linear in width in the outer table of the bone from before backwards and outwards on the right side of the head 1" behind the hair line front and being near the middle line of the head. The patient was unconscious. His condition was very serious and without regaining consciousness he passed away on the morning of 31st December 1944 at about 7 A. M. According to medical opinion the injury was grievous and dangerous to life and caused by a sharp-edged weapon. The other evidence consists of the statements of Himta Ram P. W. 5, a lambardar, and P. W. 6 Mohammad Nawaz Khan, a *sufaidposh*, who deposed to a confession by the appellant to have killed the deceased. This confession is said to have been made on 1st January after the police had entered upon investigation and we are not prepared to attach any value to it.

The report at the *thana* was made on 30th December 1944 at 7 P. M. and the investigation was soon taken in hand. The accused was produced before the police on 1st January at about 10 A. M. An application for remand up till 6th January was addressed to the Magistrate. It was granted and the accused was sent to the judicial lock up. Some witnesses were also bound down to attend on 4th January and they came after the accused had been remanded to the jail. The accused appears to have been called again and the witnesses examined. One witness Faqira died a few days later and his evidence before the committing Magistrate was admitted under S. 33, Evidence Act, by the Sessions Judge. It is urged that it was wrongly admitted. Under S. 33, Evidence Act, one of the conditions to be satisfied is "that the adverse party in the first proceeding had the right and opportunity to cross-examine." Two things must co-exist: right and opportunity. There is no dispute that the accused had the right but whether he had the opportunity to exercise his right to cross-examine, is a question of fact to be determined in each case. The condition will not be satisfied merely because the accused was physically present in police custody at the time of the examination of a witness. There must be something more than that. He should know that the witnesses would be produced and the time when and the place where they would be produced or could have known of it but not where a witness is sprung upon him as a surprise. It is immaterial whether it is designed or accidental. The object of

the section is to afford a genuine opportunity which could be effectively availed of and not for show only. In this case, all that was known was that a date would be given and was actually given and the accused was denied a chance to prepare for cross-examination. Section 33, therefore, has no application.

As to the offence committed, it has been found above that there was a sudden quarrel leading to a sudden fight and without premeditation. Exception IV to Sec. 300, Penal Code, therefore, clearly applies. The deceased was going to strike with a stick and it did give a right of private defence to the appellant but he, i.e., the appellant was not within his right to use *kulhari* on the head with the force he did and which caused the death. The appellant is, therefore, guilty of S. 304, Part I and not under S. 302, Penal Code. The sentence of transportation for life is uncalled for in the circumstances of the case and five years' rigorous imprisonment would meet the ends of justice. The appeal is, therefore, accepted in part.

Teja Singh J. — I concur in the order proposed.

V.R./D.H. *Appeal partly allowed.*

[Case No. 54.]

A. I. R (33) 1946 Lahore 277

ABDUL RASHID Ag. C. J.

AND ACHHRU RAM J.

Sardar Singh and another—Appellants
v.

Teja Singh and others — Respondents.

First Appeal No. 203 of 1943, Decided on 11th October 1945, referred by Achhru Ram J. by his order, D/- 7th June 1945.

Succession Act (1925), S. 232 — Application for grant of letters of administration with will annexed to it—Except in cases covered by S. 232 (c), application must cover entire estate of deceased: ('25) 26 P. L. R. 608=12 A.I.R. 1925 Lah. 493=90 I C 620, OVERRULED.

As provided in S. 232, except in a case where the estate of a deceased has been partially administered before an application for grant of letters of administration with the will annexed is made, the application must cover the entire estate of the deceased. It is only in cases covered by cl. (c) of the section where the executor has died after having proved the will but before having administered all the estate of the deceased that an application for administration of a part of the estate can be made, and even in that case the application must comprise the entire unadministered estate. On principle, apart from the provisions of S. 232, also it is quite clear that a person who is appointed to administer the estate of a deceased must administer the entire estate and a suit for administration, where it omits to include the whole of the estate of the deceased, is liable to be thrown out on that

ground alone: 5 Cal. 2 and ('36) 23 A. I. R. 1936 Sind 150, *Rel. on*: ('25) 26 P.L.R. 608=12 A.I.R. 1925 Lah. 493=90 I. C. 620, OVERRULED.
[P 277 C 2; P 278 C 1]

Harnam Singh — for Appellants.

Harbans Singh — for Respondents.

Achhru Ram J.—This appeal has arisen out of an application made by the respondents for grant of letters of administration in respect of a part of the estate of Harsa Singh deceased with the will of Harsa Singh purporting to have been executed by him on 25th January 1943 annexed to it. One of the grounds on which this application was contested was that being an application for grant of letters of administration for a part only of the estate of the deceased it was not competent. This objection was overruled by the learned District Judge of Rawalpindi, who, holding the will to have been duly executed by the deceased, granted the respondents the letters of administration as prayed for. The appeal came up before me in Single Bench. I was inclined to uphold the contention of the learned counsel for the appellants as to the incompetency of the application as laid but in view of the decision of Abdul Raoof J. to the contrary in A. I. R. 1925 Lah. 493¹ I referred the matter to a Division Bench. We have heard the learned counsel for the parties. After examining the relevant provisions of the Indian Succession Act I am of the opinion that the objection of the appellants to the competency of an application for grant of letters of administration in respect of a part only of the estate of the deceased testator must prevail. An application for grant of letters of administration of the estate of a deceased who has left a will is made under S. 232, Succession Act, which reads as follows:

"When—(a) The deceased has made a will but has not appointed an executor, or (b) the deceased has appointed an executor who is legally incapable or refuses to act, or who has died before the testator or before he has proved the will, or (c) the executor dies after having proved the will, but before he has administered all the estate of the deceased, an universal or a residuary legatee may be admitted to prove the will, and letters of administration with the will annexed may be granted to him of the whole estate, or, of so much thereof as may be unadministered."

It is obvious that except in a case where the estate has been partially administered before an application for grant of letters of administration is made the application must cover the entire estate of the deceased. It is only in cases covered by cl. (c) where

1. ('25) 12 A. I. R. 1925 Lah. 493 : 90 I. C. 620, *Gurbachan Kaur v. Satwant Kaur*.

the executor has died after having proved the will but before having administered all the estate of the deceased that an application for administration of a part of the estate can be made, and even in that case the application must comprise the entire unadministered estate. On principle, apart from the provisions of S. 232, also it is quite clear that a person who is appointed to administer the estate of a deceased must administer the entire estate. A suit for administration where it omits to include the whole of the estate of the deceased is liable to be thrown out on that ground alone. In A.I.R. 1925 Lah. 493,¹ Abdul Raoof J. based his decision on the ground that his attention had not been drawn to any provision in the Probate and Administration Act, under which the application for grant of letters of administration had been made in that case, prohibiting the grant of letters of administration for part of the property only. With all respect I must say that that was not the correct method of approach to the question that arose for decision. Section 19, Probate and Administration Act, under which the application for grant of letters of administration was made in that case, was absolutely analogous in terms to S. 232, Succession Act, which governs the present case. The correct way to look at the matter was to see if the application conformed to the provisions of the statute under which it purported to have been made. Like S. 232, Succession Act, S. 19, Probate and Administration Act provided for letters of administration being granted only of the whole estate except in the case where an executor had died after having proved the will but before having administered all the estate of the deceased in which case letters of administration could be granted of the portion of the estate remaining unadministered. By necessary implication grant of letters of administration of a part of the estate in any other case was prohibited. Section 19, Probate and Administration Act, was considered by Abdul Raoof J. in another connection but his attention does not appear to have been drawn to the implied prohibition contained in that section against grant of letters of administration for a part of the estate except in the case specifically provided for. In 5 Cal. 2,² a case arising under the Hindu Wills Act, under similar circumstances letters of administration of a part of the estate of the deceased testator were re-

2. ('80) 5 Cal. 2, In the Goods of Ram Chand Seal.

fused. In A.I.R. 1936 Sind 150,³ a Division Bench of the Court of Judicial Commissioners of Sind has taken the same view of the implications of S. 232, Succession Act, as I have stated above and has held that where none of the estate in respect of which letters of administration were applied for is administered, it is necessary for the petitioner to apply for a grant in relation to the whole estate.

For the reasons given above, I am respectfully of the opinion that A.I.R. 1925 Lah. 493¹ was not correctly decided. I would accordingly allow this appeal and would set aside the order of the learned District Judge granting letters of administration to the respondents for a part of the estate of the late Harsa Singh. I would, however, allow the respondents to amend their application for grant of letters of administration by including the entire estate of Harsa Singh in the application as well as in the inventory accompanying it. After the application and the inventory have been amended, the learned District Judge will proceed to dispose of the application according to law. In the meanwhile the letters of administration, if any, granted to the respondents must be surrendered to the Court. Parties have been directed to appear in the Court of the learned District Judge, Rawalpindi, on 12th November 1945 on which date the learned Judge will grant the respondents an opportunity to make the necessary amendment in the application and the inventory. Costs will abide the event.

Abdul Rashid Ag. C. J.—I agree.

D.H.

Appeal allowed.

3. ('36) 23 A.I.R. 1936 Sind 150 : 30 S.L.R. 201 : 165 I.C. 202, Bhai Khubchand v. Smt. Motilbai.

[Case No. 55.]

A. I. R. (33) 1946 Lahore 278

TEJA SINGH AND MOHD. SHARIF JJ.

Mohammad Ali s/o Sikandar

Convict — Appellant

v.

Emperor.

Criminal Appeal No. 1008 of 1944, Decided on 21st November 1945, from order of Addl. Sessions Judge, Lyallpur, D/- 31st August 1944.

(a) Penal Code (1860), S. 300, Expl. I — Use of mere abusive or vulgar language is not grave provocation.

The use of mere abusive or vulgar language cannot be regarded as a grave provocation so as to bring the case within the ambit of Expl. 1 to S. 300.

Penal Code —

('45) Ratanlal, S. 300, Page 714, 'Abusive words.'

('36) Gour, S. 300, Page 992, 'Provocation by words.'

(b) Penal Code (1860), Ss. 97 and 302—Right of private defence of property against trespasser—Trespasser not guilty of criminal intention — No right of private defence accrues against him.

One *F* and her son had built a manger in a *haveli* owned by them. The accused went there and dismantled it. When *F* and her son came to know of the demolition of the manger they went again to the *haveli* and began to reconstruct the manger. While *F* was in the act of collecting the bricks for this purpose, the accused who was lying in the *haveli* prohibited them from doing this. *F* and her son having persisted in building the manger, the accused struck both of them on the head with a *thuni* (wooden support of a bullock cart.) *F* received at least two blows and the son at least three and their skull bones were fractured. As a result both of them succumbed to the injuries. It was pleaded for the accused that as he was in exclusive possession of the *haveli* and as the victims wanted to construct the manger against his wishes, they were guilty of criminal trespass and accordingly the accused in the exercise of the right of private defence of property, was entitled to turn them out of the *haveli* and in exceeding that right the accused merely committed an offence of culpable homicide not amounting to murder :

Held that even assuming that the accused was in exclusive possession of the *haveli*, the entry of the victims in the *haveli* and their effort to reconstruct the manger demolished by the accused did not amount to criminal trespass the element of criminal intention being wanting and consequently no right of private defence of property accrued to the accused. He was therefore guilty of murder pure and simple. [P 280 C 2]

A. G. Maurice and Manzur Qadir —

for Appellant.

A. R. Khosla and Hem Raj Mahajan for Advocate General — for the Crown.

Teja Singh J. — This is an appeal by Mohammad Ali from an order of the Additional Sessions Judge, Lyallpur, convicting him under S. 302, Penal Code, for the murders of his step-mother, Mt. Fatima, and her son Farzand Ali, and sentencing him to transportation for life on each count. The facts of the case are very simple. Sikandar father of the appellant had two wives, Mt. Fatima and Mt. Jan Bibi. Mt. Jan Bibi was the appellant's mother and she had two other sons in addition to the appellant, namely, Mohammad Din and Mohammad Hussain. Farzand Ali was Mt. Fatima's only son by Sikandar. She had two daughters, Mt. Rashidan by Sikandar and Mt. Rasulan by a man to whom she was married before Sikandar. The property left by Sikandar included land and a *haveli*. The land was divided between the four sons, while the *haveli* was allotted by him to

Mt. Fatima and Farzand Ali. The prosecution version is that one day before the occurrence, that is, 17th May 1945, Mt. Fatima accompanied by Farzand Ali and Mt. Rasulan went to the *haveli* and constructed a manger therein. After they had come away, the appellant and his brothers dismantled the manger. When Mt. Fatima and her son came to know of the demolition of the manger by the other side they went again to the *haveli* and wanted to reconstruct the manger. On this occasion they took with them, besides Mt. Rasulan, one Haji. Mt. Fatima started collecting the bricks which had been thrown about. The appellant, who was then lying in the *haveli*, asked her what she was about. Mt. Fatima replied that she had come to reconstruct the manger. The appellant retorted that if he was going to allow her to restore the manger, he would never have demolished it. Mt. Fatima said that the *haveli* was hers and that she was entitled to build a manger therein. On this the appellant pulled out a *thuni*, that is, a wooden support, from a bullock cart that was standing nearby and struck Farzand Ali on the head. He gave him two blows with the result that Farzand Ali fell down. Mt. Fatima went up to Farzand Ali to rescue him and she too was belaboured by the appellant. The evidence is that he gave her three blows and she too dropped unconscious. The outcry raised by Mt. Rasulan and Haji attracted Elahi to the place. After a short time the injured persons were taken to the dispensary at Salarwala. The local doctor being absent from station, a telegram was sent to Chak Jhumra and a doctor was sent for from there. Farzand Ali succumbed to his injuries on the morning of 19th May. Mt. Fatima was taken to Sangla Hill and she died there on the evening of 21st. A head constable Man Khan happened to come to Salarwala on the morning of the 19th and recorded Mt. Rasulan's statement which was sent to the police station for registration of the case.

Both Mt. Rasulan and Haji gave evidence about the occurrence and narrated how the appellant struck first Farzand Ali and then his mother. Their evidence was supported by the statement of Elahi. Therefore, there can be no doubt that it was the appellant who caused the deaths of Farzand Ali and Mt. Fatima. Though in the statement that the appellant made in the Committing Magistrate's Court he denied that he had any hand in the crime but in the Sessions

the executor has died after having proved the will but before having administered all the estate of the deceased that an application for administration of a part of the estate can be made, and even in that case the application must comprise the entire unadministered estate. On principle, apart from the provisions of S. 232, also it is quite clear that a person who is appointed to administer the estate of a deceased must administer the entire estate. A suit for administration where it omits to include the whole of the estate of the deceased is liable to be thrown out on that ground alone. In A.I.R. 1925 Lah. 493,¹ Abdul Raoof J. based his decision on the ground that his attention had not been drawn to any provision in the Probate and Administration Act, under which the application for grant of letters of administration had been made in that case, prohibiting the grant of letters of administration for part of the property only. With all respect I must say that that was not the correct method of approach to the question that arose for decision. Section 19, Probate and Administration Act, under which the application for grant of letters of administration was made in that case, was absolutely analogous in terms to S. 232, Succession Act, which governs the present case. The correct way to look at the matter was to see if the application conformed to the provisions of the statute under which it purported to have been made. Like S. 232, Succession Act, S. 19, Probate and Administration Act provided for letters of administration being granted only of the whole estate except in the case where an executor had died after having proved the will but before having administered all the estate of the deceased in which case letters of administration could be granted of the portion of the estate remaining unadministered. By necessary implication grant of letters of administration of a part of the estate in any other case was prohibited. Section 19, Probate and Administration Act, was considered by Abdul Raoof J. in another connection but his attention does not appear to have been drawn to the implied prohibition contained in that section against grant of letters of administration for a part of the estate except in the case specifically provided for. In 5 Cal. 2,² a case arising under the Hindu Wills Act, under similar circumstances letters of administration of a part of the estate of the deceased testator were re-

fused. In A.I.R. 1936 Sind 150,³ a Division Bench of the Court of Judicial Commissioners of Sind has taken the same view of the implications of S. 232, Succession Act, as I have stated above and has held that where none of the estate in respect of which letters of administration were applied for is administered, it is necessary for the petitioner to apply for a grant in relation to the whole estate.

For the reasons given above, I am respectfully of the opinion that A.I.R. 1925 Lah. 493¹ was not correctly decided. I would accordingly allow this appeal and would set aside the order of the learned District Judge granting letters of administration to the respondents for a part of the estate of the late Harsa Singh. I would, however, allow the respondents to amend their application for grant of letters of administration by including the entire estate of Harsa Singh in the application as well as in the inventory accompanying it. After the application and the inventory have been amended, the learned District Judge will proceed to dispose of the application according to law. In the meanwhile the letters of administration, if any, granted to the respondents must be surrendered to the Court. Parties have been directed to appear in the Court of the learned District Judge, Rawalpindi, on 12th November 1945 on which date the learned Judge will grant the respondents an opportunity to make the necessary amendment in the application and the inventory. Costs will abide the event.

Abdul Rashid Ag. C. J.—I agree.

D.H.

Appeal allowed.

3. ('36) 23 A.I.R. 1936 Sind 150 : 30 S.L.R. 201 : 165 I.C. 202, Bhai Khubchand v. Smt. Motilbai.

[Case No. 55.]

A. I. R. (33) 1946 Lahore 278

TEJA SINGH AND MOHD. SHARIF JJ.

Mohammad Ali s/o Sikandar
Convict — Appellant

v.

Emperor.

Criminal Appeal No. 1008 of 1944, Decided on 21st November 1945, from order of Addl. Sessions Judge, Lyallpur, D/- 31st August 1944.

(a) Penal Code (1860), S. 300, Expl. I — Use of mere abusive or vulgar language is not grave provocation.

The use of mere abusive or vulgar language cannot be regarded as a grave provocation so as to bring the case within the ambit of Expl. 1 to S. 300.

[P 230 C 1]

2. ('80) 5 Cal. 2, In the Goods of Ram Chand Seal.

Penal Code —

('45) Ratanlal, S. 300, Page 714, 'Abusive words.'

('36) Gour, S. 300, Page 992, 'Provocation by words.'

(b) Penal Code (1860), Ss. 97 and 302—Right of private defence of property against trespasser—Trespasser not guilty of criminal intention — No right of private defence accrues against him.

One *F* and her son had built a manger in a *haveli* owned by them. The accused went there and dismantled it. When *F* and her son came to know of the demolition of the manger they went again to the *haveli* and began to reconstruct the manger. While *F* was in the act of collecting the bricks for this purpose, the accused who was lying in the *haveli* prohibited them from doing this. *F* and her son having persisted in building the manger, the accused struck both of them on the head with a *thuni* (wooden support of a bullock cart.) *F* received at least two blows and the son at least three and their skull bones were fractured. As a result both of them succumbed to the injuries. It was pleaded for the accused that as he was in exclusive possession of the *haveli* and as the victims wanted to construct the manger against his wishes, they were guilty of criminal trespass and accordingly the accused in the exercise of the right of private defence of property, was entitled to turn them out of the *haveli* and in exceeding that right the accused merely committed an offence of culpable homicide not amounting to murder :

Held that even assuming that the accused was in exclusive possession of the *haveli*, the entry of the victims in the *haveli* and their effort to reconstruct the manger demolished by the accused did not amount to criminal trespass the element of criminal intention being wanting and consequently no right of private defence of property accrued to the accused. He was therefore guilty of murder pure and simple. [P 280 C 2]

A. G. Maurice and Manzur Qadir —

for Appellant.

A. R. Khosla and Hem Raj Mahajan for Advocate General — for the Crown.

Teja Singh J. — This is an appeal by Mohammad Ali from an order of the Additional Sessions Judge, Lyallpur, convicting him under S. 302, Penal Code, for the murders of his step-mother, Mt. Fatima, and her son Farzand Ali, and sentencing him to transportation for life on each count. The facts of the case are very simple. Sikandar father of the appellant had two wives, Mt. Fatima and Mt. Jan Bibi. Mt. Jan Bibi was the appellant's mother and she had two other sons in addition to the appellant, namely, Mohammad Din and Mohammad Hussain. Farzand Ali was Mt. Fatima's only son by Sikandar. She had two daughters, Mt. Rashidan by Sikandar and Mt. Rasulan by a man to whom she was married before Sikandar. The property left by Sikandar included land and a *haveli*. The land was divided between the four sons, while the *haveli* was allotted by him to

Mt. Fatima and Farzand Ali. The prosecution version is that one day before the occurrence, that is, 17th May 1945, Mt. Fatima accompanied by Farzand Ali and Mt. Rasulan went to the *haveli* and constructed a manger therein. After they had come away, the appellant and his brothers dismantled the manger. When Mt. Fatima and her son came to know of the demolition of the manger by the other side they went again to the *haveli* and wanted to reconstruct the manger. On this occasion they took with them, besides Mt. Rasulan, one Haji. Mt. Fatima started collecting the bricks which had been thrown about. The appellant, who was then lying in the *haveli*, asked her what she was about. Mt. Fatima replied that she had come to reconstruct the manger. The appellant retorted that if he was going to allow her to restore the manger, he would never have demolished it. Mt. Fatima said that the *haveli* was hers and that she was entitled to build a manger therein. On this the appellant pulled out a *thuni*, that is, a wooden support, from a bullock cart that was standing nearby and struck Farzand Ali on the head. He gave him two blows with the result that Farzand Ali fell down. Mt. Fatima went up to Farzand Ali to rescue him and she too was belaboured by the appellant. The evidence is that he gave her three blows and she too dropped unconscious. The outcry raised by Mt. Rasulan and Haji attracted Elahi to the place. After a short time the injured persons were taken to the dispensary at Salarwala. The local doctor being absent from station, a telegram was sent to Chak Jhumra and a doctor was sent for from there. Farzand Ali succumbed to his injuries on the morning of 19th May. Mt. Fatima was taken to Sangla Hill and she died there on the evening of 21st. A head constable Man Khan happened to come to Salarwala on the morning of the 19th and recorded Mt. Rasulan's statement which was sent to the police station for registration of the case.

Both Mt. Rasulan and Haji gave evidence about the occurrence and narrated how the appellant struck first Farzand Ali and then his mother. Their evidence was supported by the statement of Elahi. Therefore, there can be no doubt that it was the appellant who caused the deaths of Farzand Ali and Mt. Fatima. Though in the statement that the appellant made in the Committing Magistrate's Court he denied that he had any hand in the crime but in the Sessions

Court he admitted that he killed both the persons by hitting them with *thuni*, Ex. P. 1. He, however, pleaded that he acted under a grave and sudden provocation. His version was that he was sleeping in the *haveli* when Mt. Fatima and her son came; the former started abusing him and then gave him a beating with her shoes. Farzand Ali caught hold of him by his testicles. Being annoyed at this the appellant took out the *thuni* and gave one blow to each of them.

Mt. Rasulan and Haji denied that the appellant was abused by Mt. Fatima but Elahi's evidence is that he heard Mt. Fatima abusing the appellant and it was then that he was attracted to the spot. I am, therefore, prepared to believe that Mt. Fatima did use abusive language and this was the cause of the whole trouble. But this does not bring the case within the ambit of Expl. I to S. 300, Penal Code. It has been held times out of number by this Court as well as by other High Courts in India that the use of mere abusive or vulgar language cannot be regarded as a grave provocation. There is no evidence at all that the appellant was given a shoe-beating by Mt. Fatima. It must be said in fairness to Mr. Manzur Qadir, learned counsel who argued the appellant's appeal before us, that he did not seriously rely upon Explanation I. His line of argument was that since the *haveli* was in the exclusive possession of the appellant and the dead person wanted to construct a manger therein against the appellant's wishes, they were guilty of criminal trespass and accordingly the appellant in the exercise of the right of private defence of property was entitled to turn them out of the *haveli*. He admitted that the right did not extend to the causing of death, but he urged that in exceeding that right the appellant merely committed an offence of culpable homicide not amounting to murder. I have no hesitation in coming to the conclusion that there is no force in the contention. In the first place, there is not a tittle of evidence to show that the *haveli* was in the exclusive possession of the appellant. Mt. Rasulan averred that the *haveli* belonged to Mt. Fatima and her son, and not a question was put to her in cross-examination to show that what she stated was not true or to make out that possession of the *haveli* was with the appellant. P. W. Haji admitted in cross-examination that the appellant's brothers only were using the *haveli* for tethering their cattle but from

this it cannot be inferred that it was not being used by Mt. Fatima and Farzand Ali for any purpose. Then, since the title in the *haveli* vested in Mt. Fatima and Farzand Ali, even if it be assumed that the appellant was in exclusive possession of it, the entry of the dead persons into the *haveli* and their effort to reconstruct the manger, which they had built on the previous day and which had been demolished by the appellant, did not necessarily amount to criminal trespass. According to the evidence of the eye-witnesses, at the time Farzand Ali was attacked, he was doing nothing and his mother was simply engaged in collecting bricks of the dismantled manger. The element of criminal intention, which was necessary to turn a simple trespass into a criminal trespass, was therefore wanting and consequently no right of private defence of property accrued to the appellant. Accordingly, I agree with the learned Additional Sessions Judge that the offence committed by the appellant amounted to murder, pure and simple. The medical evidence is to the effect that both the dead persons had five injuries each and their skull bones were fractured. This evidence was consistent with the evidence of the eye-witnesses that Farzand Ali received at least three blows and Mt. Fatima at least two. The appellant is, therefore, very lucky that he has escaped with the lesser penalty of law. The result is that the appeal fails and is dismissed.

D.S./D.H.

Appeal dismissed.

[Case No. 56.]

* A. I. R. (33) 1946 Lahore 280

FULL BENCH

DIN MOHAMMAD, ABDUR RAHMAN,
MUNIR, TEJA SINGH AND
MOHAMMAD SHARIF JJ.*Megh Raj — Defendant — Appellant*
v.*Rupchand Uttamchand through Diwan*
Chand — Plaintiffs — Respondents.

First Appeal No. 354 of 1944, Decided on 11th February 1946, referred by Full Bench, D/- 23rd October 1945.

(a) Court-fees Act (1870), S. 5—Administration Judge appointed to hear references made by taxing officer—Such Judge instead of determining question himself requesting Chief Justice to constitute another Bench — Chief Justice has jurisdiction to constitute Bench of more Judges than one to hear such question—(Per Munir, Teja Singh and Mohammad Sharif JJ. in Order of Reference).

When the Administration Judge has been appointed by a general order of the Chief Justice as the Judge to whom references by the taxing officer

have to be made the matter can be said to have been referred by the Chief Justice to the Administration Judge under S. 5. If the Administration Judge does not himself determine the question and requests the Chief Justice to constitute another Bench there is no bar to the Chief Justice appointing a Judge or Judges for hearing the reference. The general order appointing the Administration Judge to hear such references can always be recalled by the Chief Justice in a particular case and he can constitute another Judge or Judges to hear the reference in that case. Since singular includes the plural it cannot be said that because the words used in S. 5 are "such Judge," the Chief Justice has no jurisdiction to constitute a Bench of more Judges than one to hear a reference. [P 284 C 1]

Court-fees Act —

('44) Chitaley, S. 5, N. 17.

('36) Aiyer, Page 38, Note "Reference to the Chief Justice."

* (b) Court-fees Act (1870), S. 7 (iv) (f) — Suit for dissolution of partnership and for accounts valued at certain figure by plaintiff—Defendant appealing from preliminary decree in such suit must value appeal at the same figure at which plaintiff valued reliefs in plaint: ('26) 13 A. I. R. 1926 Lah. 189 : 91 I. C. 32 and ('36) 23 A. I. R. 1936 Lah. 458 : 160 I. C. 642, **OVERRULED**. — (Per *Full Bench*, *Teja Singh J. contra*).

There is no provision in the Court-fees Act which authorises a defendant to fix any valuation in his memorandum of appeal. Where, therefore, in a suit for dissolution of partnership, rendition of accounts and recovery of such amount as may be found due, the plaintiff, under S. 7 (iv) (f), values the relief sought in the plaint at a certain figure and a preliminary decree is passed dissolving the partnership, fixing the shares of the parties and directing accounts to be taken and the defendant appeals from the whole decree, and does not admit his liability to render accounts it is not open to the defendant to fix the value of the appeal at a different figure for purposes of court-fees under S. 7 (iv) (f) or some other provision of the Court-fees Act: ('26) 13 A. I. R. 1926 Lah. 189 : 91 I. C. 32 and ('36) 23 A. I. R. 1936 Lah. 458 : 160 I. C. 642, **OVERRULED**; ('29) 16 A. I. R. 1929 P. C. 147, *Expl. and Disting.*; *Case law discussed*. [P 290 C 1]

Court-fees Act —

('44) Chitaley, S. 7 (iv) (f), Note 8, Pt. 8.

('36) Aiyer, Page 112, Pt. 12.

(c) Practice—Precedents — Every judgment must be read as applicable to particular facts proved or assumed to be proved.

Every judgment must be read as applicable to the particular facts proved or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed or qualified by the particular facts of the case in which such expressions are to be found: ('24) 11 A. I. R. 1924 P. C. 126, ('40) 27 A. I. R. 1940 P. C. 230 and (1901) A. C. 495, *Rel. on*. [P 290 C 2]

(d) Court-fees Act (1870), Sch. 1, Art. 1 — Scope (Per *Teja Singh J.*) (*Obiter*).

Documents presented in a High Court are not excluded from the operation of Art. 1 of Sch. 1: ('25) 12 A. I. R. 1925 Pat. 392, *Rel. on*. [P 291 C 2]

Court-fees Act —

('44) Chitaley, Sch. 1, Art. 1, Note 2, Pt. 4.

('36) Aiyer, Page 283, Pt. 18.

(e) Interpretation of statutes — Fiscal enactment should be construed strictly.

It is a well recognised principle of interpretation of statutes that a fiscal enactment should be construed strictly and whenever there is an ambiguity the benefit of the doubt should be given to the subject: ('25) 12 A. I. R. 1925 All. 787; ('28) 15 A. I. R. 1928 Pat. 85 and ('36) 23 A. I. R. 1936 Mad. 420, *Rel. on*. [P 298 C 1]

Roop Chand — for Appellant.

R. P. Khosla & Bishen Narain — for Respds..

ORDER OF REFERENCE.

Teja Singh J.—This is a reference by the Taxing Officer under S. 5, Court-fees Act. The plaintiff brought a suit for the recovery of Rs. 6650 and in the alternative for rendition of accounts and the amount that might be found due after the accounts had been gone into. He valued the suit in the plaint both for purposes of jurisdiction and court-fee at Rs. 6650 and paid a court-fee of Rs. 517-8-0. The trial Sub-Judge refused to grant the plaintiff the relief regarding the specific amount claimed by him but passed a preliminary decree for accounts in his favour. The defendant has come in appeal to this Court and has valued the appeal for purposes of jurisdiction at Rs. 6650, but for purposes of court-fee at Rs. 130. The question is whether it was open to the defendant-appellant to put his own valuation for purposes of court-fee.

[2] It was first of all argued by Mr. Roop Chand, counsel for the defendant-appellant, that no value had been put by the plaintiff in the plaint as regards the relief of rendition of accounts and that he was free to put his own valuation under S. 7 (iv) (f). The contention appears to me to be without force, because the words of para. 4 of the plaint leave no doubt that the plaintiff did value both the reliefs claimed by him in the suit at Rs. 6650. It is correct that he did not mention this fact specifically, but the words used by him leave no doubt that this was his intention and there was reason for this. He sued for two reliefs in the alternative, one for specific sum of Rs. 6650 and the other for rendition of accounts. It was of course open to him under S. 7 (iv) (f) to value his relief of rendition of accounts at any amount that he liked. But this would not have made any difference because whatever value he put for this relief he was bound to pay court-fees on Rs. 6650, which was the higher of the two reliefs claimed by him. Accordingly it appears to me that the plaintiff saw no sense

in valuing his relief for rendition of accounts at a bigger amount and put the same valuation for both the reliefs. It was then urged by Mr. Rup Chand that even though the plaintiff had put a value in the plaint it was for him to determine the value of the appeal and the court-fee was to be paid on the amount so determined by him. The words of S. 7 (iv) (f) relied upon by the learned counsel are as follows :

[3] "The amount of fee payable under this Act in the suits next hereinafter mentioned shall be computed as follows :

[4] In suits for accounts — according to the amount at which the relief sought is valued in the plaint or memorandum of appeal :

[5] In all such suits the plaintiff shall state the amount at which he values the relief sought."

[6] Mr. Rup Chand argues that in view of the words "memorandum of appeal" it was open to him to value the appeal in the same manner, as it is open to any plaintiff in a suit for rendition of accounts to value his relief in the plaint and to pay court-fee on the amount so stated. Mr. Ram Parshad Khosla, who appears on behalf of the Crown, on the other hand, argued that the concluding words of the sub-section quoted above go to show that the privilege of valuing his relief for purposes of court-fee is confined to the plaintiff when he institutes the suit or in case of appeal when the plaintiff himself is the appellant. The authorities quoted by the learned counsel before me go to show that there is a conflict of opinion on the point. So far as the Punjab is concerned, it appears that the matter was considered for the first time in 7 P. R. 1915¹ by a Division Bench consisting of Johnstone and Shadi Lal JJ. and the learned Judges held that under S. 7 (iv) (f), Court-fees Act, an appeal from a preliminary decree in a suit for dissolution of partnership and rendition of accounts must bear court-fees *ad valorem* on the amount at which the relief is valued in the plaint. In that case the defendant was the appellant. As regards this Court, the earlier authority quoted before me is that of Martineau J. in A.I.R. 1926 Lah. 189.² That was also an appeal by a defendant against whom a preliminary decree had been passed in a suit for accounts. The learned Judge relied upon A.I.R. 1932 ALL. 228³ and held that a defendant appealing against a preliminary decree passed against him in a suit

for accounts is entitled to put his own valuation on the memorandum of appeal and pay the court-fee on that valuation. It was further held that the defendant was not bound to accept the valuation given by the plaintiff in his plaint. Later on, a Division Bench consisting of Jai Lal and Sale JJ. took the same view in A. I. R. 1936 Lah. 458.⁴ In that case it was the plaintiff who was the appellant. In the trial Court he had valued his suit for purposes of court-fee and jurisdiction at Rs. 1300 but when he came in appeal he changed the valuation to Rs. 5250. The learned Judges held that he was entitled to do so. It is curious that neither the Punjab Record case nor A. I. R. 1926 Lah. 189² was quoted before them. The rulings which the learned Judges followed were 9 Rang. 165⁵ and 56 Mad. 705.⁶ A.I.R. 1936 Lah. 879⁷ was another case in which the same view was taken by Jai Lal and Dalip Singh JJ. Addison J. while sitting as a Single Judge followed 7 P. R. 1915¹ in A.I.R. 1931 Lah. 143⁸ and held that the defendant is bound by the plaintiff's valuation of a suit for rendition of accounts and must pay court-fee on appeal on the plaintiff's valuation in the plaint. The learned Judge also referred to the Full Bench decision of the Madras High Court in 39 Mad. 725.⁹ This view of Addison J. was confirmed by a Division Bench in I.L.R. 1937 Lah 196.¹⁰ This was a suit for dissolution of partnership and rendition of accounts and the plaintiff valued it under S. 7 (iv) (f) at Rs. 5250. The Court passed a preliminary decree in favour of the plaintiff declaring that the partnership was dissolved and ordering that the accounts be taken. The defendants appealed on the ground that there should have been no preliminary decree and valued the appeal for purposes of jurisdiction at Rs. 5250 but only at Rs. 130 for purposes of the court fees. It was held that an appeal of this nature must bear court-fees *ad valorem* on the amount at which the relief is valued in

4. ('36) 23 A.I.R. 1936 Lah. 458 : 160 I.C. 642, Tarif Singh v. Kanshi Ram.

5. ('31) 18 A.I.R. 1931 Rang. 146 : 9 Rang. 165 : 133 I.C. 91 (F.B.), C. K. Umar v. C. K. Ali Umar.

6. ('33) 20 A.I.R. 1933 Mad. 330 : 56 Mad. 705 : 141 I.C. 602, In re Venkatanandam

7. ('36) 23 A. I. R. 1936 Lah. 879 : 168 I.C. 105, Mt. Shahzadi Bi v. Mt. Rahmat Bi.

8. ('31) 18 A.I.R. 1931 Lah. 143 : 131 I.C. 337, Batna Ram v. Rahmatullah.

9. ('17) 4 A.I.R. 1917 Mad. 668 : 39 Mad. 725: 33 I.C. 602 (F.B.), Srinivasacharlu v. Perindevamma.

10. ('37) 24 A.I.R. 1937 Lah. 694 : I.L.R. (1937) 18 Lah. 196: 171 I.C. 837, Feroz Din v. Muhammad Din.

1. ('14) 1 A.I.R. 1914 Lah. 507 : 7 P.R. 1915 : 28 I.C. 262, Kanjimal v. Pannalal.

2. ('26) 13 A. I. R. 1926 Lah. 189 : 91 I.C. 32, Thakur Das v. Daulat Ram.

3. ('22) 9 A.I.R. 1922 All. 228 : 44 All. 542 : 66 I.C. 841, Kanhaiya Lal v. Ram Sarup.

the plaintiff and a defendant-appellant cannot value his appeal for the purposes of court-fee at any figure that he likes. It appears that the other two Division Bench decisions of 1936 were not cited. It is unnecessary to refer to the decisions of other Courts. They are all summed up at p. 222 of Chitaley's Court-fees Act, Edn. 1944 and it has been pointed out that while the view of the Madras High Court and the Sind Judicial Commissioner's Court is that the defendant is bound to accept the plaintiff's valuation of the suit for the purpose of the appeal and pay court-fee accordingly, that of the High Courts of Allahabad Bombay, Patna and Rangoon is different and they have held that the defendant is entitled to put his own valuation on the appeal for purposes of court-fee. I only wish to refer to A.I.R. 1938 Mad. 435,¹¹ a Full Bench decision of the Madras High Court, the facts of which were analogous to those of A.I.R. 1936 Lah. 458,⁴ but the view taken by the Hon'ble Judges was quite contrary to that taken by this Court.

[7] As the matter is of general importance I consider that in order to set the conflict at rest at least so far as this Court is concerned, the case be laid before the Hon'ble the Chief Justice with the request that it should be referred to a larger Bench.

[8] [The case then went to Munir, Teja Singh and Mohd. Sharif JJ. who in their turn made the following Order of Reference to a Full Bench of five Judges.]

[9] MUNIR J.—This case has been referred to a Full Bench by an order of the learned Chief Justice under S. 5, Court fees Act. The circumstances which led to this reference are as follows : Messrs. Rup Chand Uttam Chand, plaintiff, brought a suit against Megh Raj defendant for money certain and in the alternative for dissolution of partnership, rendition of accounts and decree for the amount that may be found due. It was alleged in the plaint that a partnership existed between the plaintiff and the defendant, that the parties agreed to dissolve the partnership and that the defendant agreed to pay a sum of Rs. 6400 and to transfer to the plaintiff certain shares in a company of the value of Rs. 250. The agreed payment not having been made, the plaintiff sued for the recovery of Rupees 6400 and for the transfer of the shares of the value of Rs. 250. If the agreement to

pay the money and to transfer the shares was not proved or was found to be unenforceable, the plaintiff prayed for the dissolution of partnership and rendition of accounts. The plaint was valued for purposes of court-fee at Rs. 6650 but the approximate amount that the plaintiff expected to recover on taking accounts was not mentioned as required by O. 7, R. 2, Civil P. C. The lower Court found that the object of the agreement to pay Rs. 6400 and to transfer the shares of the value of Rs. 250 to the plaintiff being to stifle criminal prosecution, the agreement, even if proved, was unenforceable. It, therefore, dismissed the claim on the agreement but granted to the plaintiff a preliminary decree declaring the partnership dissolved from a certain date, declaring the shares of the parties in the partnership and directing accounts to be taken. From this preliminary decree the defendant preferred an appeal and valued the appeal for purpose of court-fee at Rs. 130 and paid *ad valorem* court-fee on that amount. An objection was taken to this valuation by the stamp reporter and the matter was referred to the Registrar who is the taxing-officer for purposes of S. 5. The taxing-officer, however, in view of the general importance of the question, referred it to the Administration Judge who by a general order of the Chief Justice is the Judge appointed to hear references by the taxing-officer. The learned taxing Judge did not decide the question and referred the matter to the Chief Justice with a recommendation that a Full Bench be appointed to examine the matter. Thereupon the learned Chief Justice constituted the present Bench to hear the reference. At the very outset an objection was taken by the learned counsel for the plaintiff-respondent that this Bench had no jurisdiction to hear the reference. He relied on the terms of S. 5, Court-fees Act, and contended that the learned Taxing Judge was bound to give a final decision on the point involved and could not further refer it to another Bench. After hearing the parties on this part of the case, we have no doubt about our jurisdiction to go into the matter. Section 5, Court-fees Act, is as follows :

[10] "When any difference arises between the officer whose duty it is to see that any fee is paid under this chapter and any suitor or attorney, as to the necessity of paying a fee or the amount thereof, the question shall, when the difference arises in any of the said High Courts, be referred to the taxing officer, whose decision thereon shall be final, except when the question is, in his opinion

¹¹. ('38) 25 A.I.R. 1938 Mad. 435 : I.L.R. (1938) Mad. 598 : 175 I. C. 470 (F.B.), In re Dhanukodi Nayakar.

one of general importance, in which case he shall refer it to the final decision of the Chief Justice of such High Court, or of such Judge of the High Court as the Chief Justice shall appoint either generally or specially in this behalf."

[11] The point sought to be made by the learned counsel or the plaintiff-respondents is that the taxing-officer can refer the case only to the Chief Justice or to such Judge of the High Court as the Chief Justice shall appoint, whose decision shall be final and that there is no provision in the section for reference by the Chief Justice or such a Judge to another Judge or Judges. This, to our mind, is a complete miscomprehension of the position. The Administration Judge of this Court has been appointed by a general order of the Chief Justice as the Judge to whom references by the taxing-officer have to be made. The matter can, therefore, be said to have been referred by the Chief Justice to the Administration Judge under S. 5, Court-fees Act. But the Administration Judge did not himself determine the question and requested the Chief Justice to constitute another Bench and the Chief Justice did so. There is, in our opinion, no bar to the Chief Justice appointing a Judge or Judges for hearing a reference from the taxing-officer, in a special case. The general order appointing the Administration Judge to hear such references can always be recalled by the Chief Justice in a particular case and he can constitute another Judge or Judges to hear the reference in that case. The singular includes the plural, and we are unable to accept the contention that because the words used in S. 5 are "such Judge," the Chief Justice has no jurisdiction to constitute a Bench of more Judges than one to hear a reference. We, therefore, repel the preliminary objection.

[12] The question of the applicability of S. 17 to the reliefs claimed in the plaint seems to have been raised by the learned counsel for the defendant before the Taxing Judge but the claim based on the alleged agreement having been dismissed, we do not at the present stage propose to consider under S. 13, Court-fees Act, the question whether the plaint was properly stamped or not. If the appeal becomes competent and comes up for hearing before a Division Bench it will be for that Bench to decide, if it considers necessary to do so, whether the plaint was undervalued. At present the only question before us is whether the memorandum of appeal has been properly stamped. It is agreed that so far as the relief for dissolution of partnership and

rendition of accounts is concerned the plaint had to be stamped under S. 7 (iv) (f), Court-fees Act. That provision is as follows :

[13] "The amount of fee payable under this Act in the suits next hereinafter mentioned shall be computed as follows :

[14] In suits for accounts-according to the amount at which the relief sought is valued in the plaint or memorandum of appeal :

[15] In all such suits the plaintiff shall state the amount at which he values the relief sought."

[16] The learned Taxing Judge has taken the plaint to mean that the plaintiff valued the relief sought, so far as the relief for rendition of accounts was concerned, at Rs. 6650 and we must decide the question on the assumption that this was the amount at which the plaintiff valued the relief of rendition of accounts as required by S. 7, Court-fees Act. The question, however, is whether the plaintiff having fixed this valuation of the relief in his plaint, it is open to the defendant when appealing from the preliminary decree to fix his own value, in this case Rs. 130 under cl. (f), sub-s. (iv) of S. 7, Court-fees Act. The section is not happily worded and gives rise to more than one ambiguity. It gives to the plaintiff the discretion to fix the amount at which he values the relief sought in the plaint. But it is contended by the learned counsel for the defendant that the same discretion must be deemed to have been given to the appellant, plaintiff or defendant, when he appeals from the preliminary decree in a suit for accounts. In support of this argument emphasis is laid on the words "or memorandum of appeal" in the clause "according to the amount at which the relief sought is valued in the plaint or memorandum of appeal." We have heard lengthy arguments on this point but unfortunately are not agreed among ourselves. The latest view taken of this matter by Division Bench of our Court in 18 Lah. 196¹⁰ is that the defendant when appealing from the preliminary decree in a suit for accounts is bound by the valuation fixed by the plaintiff in his plaint. The same is the view of the Madras High Court expressed in a Full Bench decision by five Judges and a subsequent Division Bench decision. The Nagpur High Court also has generally favoured this view. The existing state of authority in the other High Courts, however, is opposed to this view. The Allahabad, Bombay, Patna, Rangoon and Calcutta High Courts hold that cl. (f), sub-s. (iv) of S. 7, Court-fees Act, gives an unqualified discretion to the appellant to fix his valuation of the appeal from a prelimi-

nary decree, irrespective of what the valuation in the plaint was. The question is of very frequent occurrence and of great importance to the revenue and since we are not agreed among ourselves and two of the decisions cited on this point or an allied question which is relevant to the determination of the question involved in this case, are by five Judges, we are unanimously of the opinion that this question, if the learned Chief Justice agrees, should be referred to a Bench of at least five Judges. The question referred to the larger Bench is as follows :

[17] "Where in a suit for dissolution of partnership, rendition of accounts and recovery of such amount as may be found due, the plaintiff, under S. 7 (iv) (f), Court-fees Act, values the relief sought in the plaint at a certain figure and a preliminary decree is passed dissolving the partnership, fixing the shares of the parties and directing accounts to be taken and the defendant appeals from the decree, is it open to the defendant to fix the value of the appeal at a different figure for purposes of court fee under S. 7 (iv) (f) or some other provision of the Court-fees Act ?"

Judgment of the Full Bench.

[18] **Abdur Rahman J.**—It is unnecessary to re-state the facts which have given rise to this reference. They have been stated in the order of reference made by the Full Bench on 23rd October 1945. The question referred to us for opinion appears at the end of that order. It is not free from difficulty and is capable of being answered either way. That is why there is not only divergence of opinion amongst the Indian High Courts but different views have been at times expressed by the learned Judges of the same Court. It is unfortunate that in spite of this difference the Legislature has not thought it fit to intervene and remove the difficulty by a small amendment of the Act. That would have been a more satisfactory method of solving this problem and would have saved a great deal of public time. I hope that the Central Legislature will do so in the near future. The words which have given rise to this difficulty appear at the end of S. 7 (iv), Court-fees Act, and read as follows :

[19] "according to the amount at which the relief sought is valued in the plaint or memorandum of appeal."

[20] In all such suits the plaintiff shall state the amount at which he values the relief sought."

[21] Had the words "memorandum of appeal" not appeared in the first sentence as they did not appear in any other part of S. 7, or the words "or appeals" and "or the appellant" found their way after the words "suits" and "the plaintiff" in the second sentence, the interpretation would have pre-

sented very little difficulty. But the existence of the words "memorandum of appeal" led some of the learned Judges to conclude that the valuation of what forms the subject of an appeal either by the plaintiff or by the defendants was decisive of the matter regardless of the plaintiff's valuation of the subject-matter of the plaint for purposes of court-fee. A greater emphasis was laid on the other hand by the learned Judges of other High Courts on the second sentence and inasmuch as the term "suit" employed therein was held to include an appeal, they were of the view that the valuation given by the plaintiff alone in his plaint, when the subject of the appeal was co-extensive with the subject-matter of the suit, and in his memorandum of appeal when it was not co-extensive, ought to determine the valuation for the purpose of court-fee on appeal. It may be assumed for the purposes of the decision in this case as found by the Full Bench in its referring order that the plaintiff had valued the relief for rendition of accounts decreed in his favour by the trial Court at Rs. 6650 and that the defendant had, in appealing from that decree, not admitted his liability to render accounts but had prayed for the suit to be dismissed *in toto*. The learned Judges who referred the case to a larger Bench may, therefore, be taken to have meant that the defendant was appealing from the whole of the decree passed against him and was not admitting his liability to render accounts. In other words, the relief claimed by the defendant in appeal was co-extensive with what had been claimed by the plaintiff in his plaint and which he had valued at Rs. 6650. The short question to decide, therefore, is whether the defendant could in the circumstances reduce the valuation for the purposes of court-fee in appeal ?

[22] There is no provision in the Court-fees Act which authorises a defendant to fix any valuation in his memorandum of appeal. The omission cannot be presumed to have been accidental. Nor can it be reasonably presumed that the Legislature had, while making it incumbent upon a plaintiff to pay court-fee on his plaint and even on an appeal preferred by him, intended to exempt a defendant altogether from paying any court-fee on his appeal. The Legislature could not have used the word "suit" in the sentence at the end of S. 7 (iv) as synonymous with the word "plaint" used by it in the preceding one and a suit must be, in my opinion, held to cover the proceedings in all

its stages, for appeals are after all continuation of suits and arise out of them. It is true that the word was primarily used by the Legislature to refer to suits described in the six articles of sub-cl. (iv). But the use of the words "In all such suits" immediately following the words "memorandum of appeal" may be legitimately taken to include it as well.

[23] The question then is what court-fee should a defendant or even a plaintiff pay in cases which fall under sub-cl. (iv) of S. 7, Court-fees Act? The valuation given in other sub-clauses is fixed and cases falling under them need not be considered here although it must be admitted that the principle on which an appellant can be required to pay court fee on appeal even in such cases will be the same as in those where he is required to pay court fee under any other provision of the Act. As for cases covered by S. 7 (iv), Court-fees Act, the option to state the amount at which he values the relief was left by the Legislature to the plaintiff, for it was bound to vary from case to case and from plaintiff to plaintiff and the Legislature must have found it difficult to discover any fixed standard or scale at which every plaintiff could be required to put the same valuation in every case. But once the option has been exercised and the plaintiff has stated the value in his plaint, I find very little difference between such a case and a case where valuation has been fixed by the Legislature. The value of the relief claimed by the plaintiff cannot change from time to time and must remain the same in all the stages of a suit, i. e., either in the first Court or in a first or a second Court of appeal as long as the relief is the same. What to say of a defendant who has no option to value the relief claimed by a plaintiff, he (i. e., the plaintiff) himself cannot be in my view permitted to alter it at his sweet will subsequently, for he must be deemed to have exhausted his option which the Legislature had conferred upon him when he fixed it at the time of the institution of his plaint. If the defendant, therefore, intends to prefer an appeal from the whole of the decree granted against him, he must conform to the valuation made by the plaintiff as by appealing from the decree the former wants the latter to be deprived of what he has succeeded in securing by the decree under appeal and must, therefore, value the relief at the figure at which the former (i. e., the successful plaintiff) had valued the relief which he had the option to

fix. A defendant has not been given any option to fix a value for the relief claimed by a plaintiff even in appeal under any provision of the Act and cannot, therefore, be allowed to say as to what in his view was the value of the relief granted to the plaintiff when the latter had been given the option to fix it for the purposes of the suit and had done so. In the absence of any power in the defendant to value the relief claimed by the plaintiff, the former cannot but mention the value given by the latter in his plaint for that is the only value which exists on the record and must continue unchanged unless some one has a power to effect a change in it. This is the grammatical construction according to my reading of the last two sentences in sub-cl. (iv) of the section if they are read together and should be placed on them leaving it to the Legislature to change them if it is of a different opinion. I might, however, add that it is possible for the plaintiff to reduce the valuation of the relief in appeal but that can only be done when the relief claimed by him in appeal is less than what was claimed by him in his plaint. The question whether the defendant can in his appeal value the relief differently if the subject-matter of his appeal is not substantially the same as that of the suit is more difficult to answer, but it has not been referred to us for opinion and I need not, therefore, pause to consider it.

[24] As for the decisions of the various High Courts to which our attention was invited during the arguments, Sulaiman C. J. and Boys J. may safely be taken to have said all that could reasonably be said in support of the opposite view in 47 ALL. 756.¹² Sulaiman C. J. had himself to concede however at p. 761 of the report that the view which I have put forward and which I might say has generally been the view of this Court and that of the Madras High Court is not only reasonable but has force. But he came to a different conclusion mainly because the plaintiff was authorised to value his relief at an arbitrary figure while filing his plaint and he considered that there was no justification for not conferring the same privilege on a defendant who wished to file an appeal. The other reason which weighed with him was that all fiscal Acts should be construed clearly against the Government. It is a well-recognised principle of law that all fiscal enactments have to be as far as possible construed in favour of the

12. (25) 12 A. I. R. 1925 All. 787 : 47 All. 756 : 89 I.C. 122, Chunni Lal v. Sheo Charan Lal.

subject and I should have willingly given effect to it had it been possible to clothe a defendant with the authority of fixing the value of a relief asked for by the plaintiff and which he alone was entitled by the last words of the section to fix. The option to fix that value was given to the plaintiff as it was not otherwise capable of being estimated and it was for him to say as to what he regarded to be the value of the relief which he was asking in the plaint. The other reason given by the learned Chief Justice does not appear to me to be correct either — and I say so with the greatest deference—as the Legislature had in its wisdom not conferred the privilege of valuing an appeal at any figure that he liked on the defendant while it had conferred that privilege on the plaintiff expressly. The law is not logical always and I cannot find in the absence of a clear provision to that effect that the defendant should have also the same privilege. That is the province of a Legislature and not that of a Judge. Boys J., while recognising that it was very difficult and probably impossible to find any measure of valuation for such a relief, thought that this option was given to the plaintiff “merely in order to give a starting point and not with any intention, one way or the other, that it should or should not govern the appeal whether from the preliminary or the final decree.” I am not at present concerned with final decrees. Once a definite sum of money is found to be due by one party to the other and the appeal is from the final decree and not from the preliminary decree, different considerations would prevail. But I cannot see why the valuation by the plaintiff should be regarded to be merely the starting point only and why the plaintiff’s option exercised by him according to the provisions of law at the starting point may be allowed to be changed by any other person at his option arbitrarily in appeal without any other similar provision of law.

[25] I need not discuss the other Allaha-bad cases which were cited by learned counsel for the appellant and are given by me in the margin [*i.e.*, (1) 32 ALL. 517;¹³ (2) 44 ALL. 542;³ and (3) A.I.R. 1937 ALL. 465¹⁴] as they do not advance the matter any further. It may, however, be pointed out that in the first case 32 ALL. 517¹³ Tudball J. had mainly relied

on the practice of that Court which had been in existence when that matter came up for decision and on the words “memorandum of appeal” used in the first sentence without paying any attention to the second sentence. In 44 ALL. 542³ the subject matter of appeal was not co-extensive with the subject-matter of the plaint while in A. I. R. 1937 ALL. 465¹⁴ the learned Judge had simply followed the decision in 47 ALL. 756.¹²

[26] The course of decisions in Bombay has not been uniform. In fact, the two learned Judges who were called upon to decide the point for the first time in 52 Bom. 904¹⁵ disagreed amongst themselves and the matter had to be, therefore, referred to a third Judge who agreed with Fawcett J. and held that the valuation given by the plaintiff in his plaint would have to be retained by the defendant in appeal as long as the subject-matter of the suit and that of appeal were identical. Mirza J. did not give any reasons for his opinion. He preferred to follow the Allaha-bad decision in 47 ALL. 756.¹² Sen J. however, took a different view in A. I. R. 1935 Bom. 212.¹⁶ But that was his opinion alone although sitting on a Division Bench and the other learned Judge had not expressed any opinion on that point. Even Sen J.’s view was to a large extent influenced first by the decision of their Lordships of the Privy Council in 10 Lah. 737¹⁷ which was in my humble view not correctly appreciated by the learned Judge at that time and secondly by the Madras decision in 56 Mad. 705⁶ which has now been overruled by a Full Bench of five Judges in I. L. R. (1938) Mad. 598.¹¹ Sen J. himself expressed a different view, however, in A. I. R. 1941 Bom. 242¹⁸ when sitting with Beaumont C. J. and followed the Madras Full Bench decision to which I have referred above. The Calcutta decision in 57 Cal. 463¹⁹ is not relevant as that related to an appeal from a final decree. But the decision in A.I.R. 1930 Cal. 473²⁰ is in favour of the view that I am inclined to take in the present case.

15. ('28) 15 A.I.R. 1928 Bom. 476; 52 Bom. 904; 115 I. C. 391, Potchalal v. Umedram.

16. ('35) 22 A.I.R. 1935 Bom. 212; 156 I. C. 424, Vershi Kanji v. Kaku Kanji.

17. ('29) 16 A.I.R. 1929 P. C. 147; 10 Lah. 737; 56 I. A. 232; 117 I. C. 493 (P.C.), Faizullah Khan v. Mauladad Khan.

18. ('41) 28 A.I.R. 1941 Bom. 242; I.L.R. (1941) Bom. 477; 195 I. C. 894, Kashiram v. Ranglal.

19. ('29) 16 A.I.R. 1929 Cal. 815; 57 Cal. 463; 124 I. C. 77, Kantichandra v. Radharaman Sarkar.

20. ('30) 17 A.I.R. 1930 Cal. 473; 127 I. C. 665, Pannalal v. Abdul Gani.

13. ('10) 32 All. 517; 6 I. C. 832, Bhola Nath v. Parsotam Das.

14. ('37) 24 A. I. R. 1937 All. 465; 170 I.C. 119, Hari Das v. Murli Prasad.

[27] The decision of the Patna High Court in 3 Pat. 146²¹ is not in point as the liability to render accounts was not denied in that case by the defendant in his appeal to the High Court and the subject-matter of the appeal was thus not co-extensive with that of the plaint. That is why the Madras Full Bench decision in 39 Mad. 725⁹ was only distinguished and not differed from. James J. was of the view, however, in A. I. R. 1930 Pat. 605²² and A. I. R. 1931 Pat. 335²³ that the defendant was not entitled to put any value on his appeal which was different from that given by the plaintiff. It is true that he appears to have modified his opinion to some extent in A.I.R. 1935 Pat. 396²⁴ when he was sitting on a Full Bench with Wort and Mohammad Noor JJ. but even there he expressed his opinion in a very guarded manner and stated that the defendant was entitled to change the valuation in extraordinary circumstances such as those found in that case although as a matter of general rule he was not competent so to do. Mohammad Noor J. gave no reasons for his opinion but expressed his agreement with the judgment proposed by Wort J. That learned Judge gave no reasons other than those which had been given by Sulaiman C. J. in 47 ALL. 756¹² and with which I have already dealt elsewhere. It is true that like Page C. J. in 9 Rang. 165⁵ he tried to find support for his opinion from the decision of their Lordships of the Privy Council in 10 Lah. 737,¹⁷ but if a decision is an authority on the facts of a particular case and the observations by their Lordships have to be construed as, I think, they must be, with reference to the facts which they were called upon to decide, that decision could not have been pressed into service as it was either by Wort J. in the case with which I am now dealing or by Page C. J. in 9 Rang. 165.⁵ I shall discuss the decision by their Lordships of the Judicial Committee in 10 Lah. 737¹⁷ at the end.

[28] The learned Chief Justice of the Rangoon High Court also gave no fresh reasons in 9 Rang. 165⁵ except those that were contained in the Allahabad judgment in 47 ALL. 756¹² and the interpretation which he was inclined to place on the Privy Council deci-

sion in 10 Lah. 737.¹⁷ A learned Single Judge of the Nagpur High Court followed the decision in 47 ALL. 756¹² in A.I.R. 1933 Nag. 127²⁵ and gave no further reasons for that opinion. A Division Bench of that Court took a different view, however, in A. I. R. 1943 Nag. 13²⁶ and followed the decision in 18 Lah. 196.¹⁰ The trend of the decisions in Sind has been in accordance with the view which has generally prevailed in Madras and Lahore: see A.I.R. 1921 Sind 149²⁷ and A.I.R. 1927 Sind 100.²⁸ But for a discordant note which was struck by Ramesam J. in 56 Mad. 705⁶ all the decisions in Madras from 23 Mad. 490²⁹ to a Full Bench of five Judges in A.I.R. 1938 Mad. 435 : I.L.R. (1938) Mad. 598¹¹ have been to the effect that an appellant is not entitled to change the value of the relief fixed by the plaintiff under S. 7 (iv), Court-fees Act, and must stick to the value of the relief given by the plaintiff in his plaint as long as the relief claimed in appeal is co-extensive with what was claimed in the plaint. It is unnecessary to refer to all the cases decided by that Court and it will be sufficient in my opinion to cite the two cases to which I have already referred in support of the view with which I find myself in respectful agreement. The Full Bench considered the decision of their Lordships of the Privy Council in 10 Lah. 737¹⁷ and overruled the decision in 56 Mad. 705⁶ as the interpretation put upon it by Sir Vepa Ramesam was found to be incorrect. And it was that interpretation which had been accepted by Page C. J. in 9 Rang. 165,⁵ by Wort J. in A.I.R. 1935 Pat. 396,²⁴ by Sen J. in A. I. R. 1935 Bom. 212,¹⁶ and by Jai Lal and Sale JJ. in A. I. R. 1936 Lah. 458.⁴

[29] Coming to Lahore, the first decision in point of time to which reference was made at the bar was that of the Punjab Chief Court in 7 P. R. 1915.¹ It gives no reasons for the view that an appellant was bound by the valuation fixed by a plaintiff under S. 7 (iv), Court-Fees Act, although one cannot forget that Johnston and Shadi

21. ('24) 11 A. I. R. 1924 Pat. 161 : 3 Pat. 146 : 75 I. C. 871, Kuldip Sahai v. Harihar Prasad.
22. ('30) 17 A.I.R. 1930 Pat. 605 : 128 I. C. 795, Phulartend Coal Co. v. Burrakar Coal Co.
23. ('31) 18 A. I. R. 1931 Pat. 335 : 10 Pat. 458, 133 I. C. 365, Butto Krishna v. Barkar Coal Co.
24. ('35) 22 A. I. R. 1935 Pat. 396 : 14 Pat. 658 : 159 I. C. 4 (S.B.), Deoji Goa v. Tricumji Jivan.

25. ('33) 20 A. I. R. 1933 Nag. 127 : 29 N. L. R. 34 : 141 I. C. 277, Binraj v. Kisan Lal.
26. ('43) 30 A. I. R. 1943 Nag. 13 : I.L.R. (1943) Nag. 17 : 205 I. C. 17, Sheoram v. Atmaram Raghaji.
27. ('21) 8 A. I. R. 1921 Sind 149 : 16 S. L. R. 273 : 79 I. C. 582, Dipchand Dowlatram v. Premchand Chimandas.
28. ('27) 14 A. I. R. 1927 Sind 100 : 21 S. L. R. 377 : 98 I. C. 909, Mahomed Rahmoo Mowji v. Ibrahim Gangji.
29. (1900) 23 Mad. 490, Samiya Mavali v. Minammal.

Lal JJ. (as they then were) were parties to that decision. Martineau J. followed Pig-gott J.'s decision in 44 ALL. 542³ although it was clearly distinguishable and held in A.I.R. 1926 Lah. 189² that a defendant was not bound to accept the valuation given by a plaintiff in his plaint and was entitled to put his own valuation on the memorandum of appeal and pay the court-fee on that valuation. This was dissented from in A.I.R. 1931 Lah. 143⁸ by Addison J. who preferred to follow the Madras Full Bench decision in 39 Mad. 725⁹ which had in its turn followed 23 Mad. 490²⁹ and to which I have already referred. The same view was taken by a Division Bench of this Court in A. I. R. 1932 Lah. 132³⁰ although the appeal was in that case preferred by a plaintiff. A different view was, however, expressed by Jai Lal and Sale JJ., in A. I. R. 1936 Lah. 458.⁴ But this was on the basis of the Privy Council decision in 10 Lah. 737,¹⁷ the Rangoon decision in 9 Rang. 165⁵ and Madras decision in 56 Mad. 705.⁶ The matter was again considered by another Division Bench composed of Addison J. and my brother Din Mohammad in A. I. R. 1937 Lah. 694¹⁰ and a number of reasons were given by them at p. 696 for the view that a defendant must value his appeal at the valuation put in by the plaintiff in his plaint for purposes of court-fee if he (defendant) appeals from a preliminary decree for accounts and disputes his liability to account. With these I respectfully agree. They also considered the effect of their Lordships' decision in 10 Lah. 737¹⁷ and found that it did not support the view taken by Page C. J. in 9 Rang. 165.⁵

(30) As to the decision of their Lordships of the Judicial Committee in 10 Lah. 737¹⁷ the necessary facts have been given in the headnote. It reads as follows :

(31) "On taking accounts in a partnership suit a decree was made that Rs. 19,991 was due from the plaintiffs to defendant 1. The plaintiffs (who had valued their suit at Rs. 3,000) within the time limited, appealed praying that the decree be set aside and that a decree be made for such an amount as might be found due to them. By their memorandum of appeal they valued the appeal at Rs. 19,991, and paid court-fees accordingly. The appellate Court remanded the matter for a re-trial but ordered that the plaintiffs should not have a decree for any sum which might be found due to them, since in their view the court-fees paid did not cover that relief, and to that extent the appeal was then barred by limitation."

(32) It was held by their Lordships reversing the Judicial Commissioner of the North West Frontier Province, Peshawar, that the

30. (32) 19 A.I.R. 1932 Lah. 132 : 13 Lah. 391 : 135 I. C. 499, *Sri Kishan Das v. Sat Narain*.

memorandum of appeal by the plaintiffs to the Court below did state in terms of the Court-fees Act the amount at which the relief sought was valued by them and that the court-fee of the value of Rs. 975 paid by them on appeal was sufficient to cover also the relief as regards the Rs. 3,000 which they had alleged to be due to them. In deciding the question of valuation and court-fee Lord Shaw observed as follows :

(33) "Their Lordships find no reason for treating that payment (of Rs. 975) either as upon an undervalue or split value. Their Lordships think, with much respect to the Judicial Commissioner that it was a mistake to treat the payment of Rs. 975 as a fee made only on the amount of the decree passed against the appellant. That amount as already stated may be not only in full but largely in excess of the true sum of relief at which a sound valuation could in the present circumstances be said to reach, and it covered the appeal as a whole including that sum (of Rs. 19,991) on the one hand and a much smaller figure of Rs. 3,000 on the other.

(34) Their Lordships are clearly of opinion that the memorandum of appeal in the present case did state in terms of the Act the amount at which the relief was sought. This determines the appeal. A reference may be added to the results which would have followed from the course adopted below.

(35) The Judicial Commissioner found that a remand should only be granted as to the Rs. 19,000. The result of this would be that although accounts were taken on the remand and the Rs. 19,000 was largely reduced and the sum of Rs. 3,000 or more or less than that sum were found due to the plaintiffs, no remedy could be granted for the latter event because according to the judgment only a sectional and not a fee covering all the relief sought had been paid and, therefore, one item and claim for Rs. 3,000 had finally dropped out of the case."

(36) In order to appreciate this decision it must be remembered (a) that the appeal to the Judicial Commissioner was preferred by the plaintiffs ; (b) that the appeal was not from a preliminary decree but from a final decree ; (c) that the relief claimed by the plaintiffs in appeal was not the same as had been asked for in the plaint and that the preliminary decree for accounts which was presumably passed in the suit was not being challenged in appeal ; and (d) that the objection was being in fact raised by the plaintiffs merely to the method of taking accounts by which a certain sum of money was instead of being found due to the plaintiffs was found to be due by them. None of these features exist in the present case. The appeal before the Judicial Commissioner of Peshawar was not filed by a defendant but by the plaintiffs who were according to my reading of the relevant words of S. 7 (iv), Court-fees Act, entitled to value the relief claimed by them when it was not co-exten-

sive with what had been claimed by them in their plaint. They had to value the relief in appeal at Rs. 19,991 as the appeal was from a final decree and they wanted to get rid of that ascertained liability but were not required to pay a court-fee on Rs. 3000—the sum claimed by them—as they were objecting to the method in which the accounts were taken and which would have led according to them on a proper account taking to a decree in their favour to the extent of Rs. 3000. That is why their Lordships did not treat the payment of court-fee on the value of Rs. 19,991 “as upon an undervalue or split value” and that is why they found that the court-fee paid on that sum “may be not only in full but largely in excess of the true sum of relief at which a sound valuation could, in the present circumstances, be said to reach and it covered the appeal as a whole.”

[37.] The observation by Lord Tomlin during the course of arguments before their Lordships was not correctly appreciated by Sir Viper Ramesam and by the other learned Judges—and I say so with great deference—as it was not in all probability realised that the appeal to the Judicial Commissioner was in that case filed by the plaintiffs and that the relief claimed by them in appeal was entirely different from what was claimed by them in the plaint. Lord Tomlin’s observation was as follows :

[38.] “In S. 7 the amount of the fee is to be computed, in suits for accounts, according to the amount at which the relief sought is valued in the plaint or memorandum of appeal. If, therefore, the appellant (who was the plaintiff) values the relief in the memorandum of appeal and pays a fee thereon, that is the amount of fee properly payable. Of course if the appellant recovers more, he pays the extra fee under S. 11 of the Act (which again applies to plaintiffs alone). But you (counsel for respondents) cannot complain that the amount valued in the memorandum of appeal is not the proper amount.”

[39.] I see nothing in this observation which could have led one to infer that a defendant could in an appeal from a preliminary decree for accounts value the relief at any figure that he liked regardless of what the plaintiff had stated in his plaint. In order to understand what the noble Lord had said, one cannot forget the facts of the case in which that observation was made. Placing the grammatical construction on the relevant words of the statute and on a general survey of all the decided cases, I am of the view that the question referred to us for opinion must be answered in the negative and I would answer it accordingly.

Having regard to the divergence of judicial opinion I would make no order in regard to costs of this reference.

[40.] **Din Mohammad J.**—I agree and would like to add that nothing that has been argued before us in this case has induced me to alter the opinion already expressed by the Bench of which I was a member in 18 Lah. 196.¹⁰ I would further observe that the analysis of the decided cases made by my brother Abdur Rahman clearly indicates that the preponderance of authority is in favour of that view. But even if this were not so, the proposition that when the value of a suit has already been fixed by a plaintiff under S. 7 (iv), Court-fees Act, it is open to an unsuccessful defendant to interfere with it on appeal to suit his own convenience, even if the subject-matter of the appeal is identical, does not, if I may say so with all respect, appear to me to be either convincing or reasonable. It is so out of the ordinary way that despite the fact that it has been advanced by some eminent Judges, I would not be prepared to subscribe to it. In no other instance under the Court-fees Act, this state of affairs is allowed to exist and, if nothing else, the view favoured by us claims the virtue of uniformity. To hold that the value once fixed is fixed for all is neither unjust nor unconscionable and so long as the Legislature does not choose to resolve the conflict it would work no hardship if this principle is required to prevail in this province at least.

[41.] So far as the Privy Council judgment in 10 Lah. 737¹⁷ is concerned, suffice it to say that as observed by their Lordships of the Privy Council themselves in 5 Lah. 92³¹ and later re-affirmed in A. I. R. 1940 P. C. 230³² on the strength of the famous observations made by Lord Halsbury in (1901) A. C. 495³³ at p. 506,

[42.] “every judgment must be read as applicable to the particular facts proved or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed or qualified by the particular facts of the case in which such expressions are to be found.”

[43.] This being so, that judgment cannot be

31. ('24) 11 A. I. R. 1924 P. C. 126 : 5 Lah. 92 : 51 I. A. 163 : 83 I. C. 418 (P. C.), *Hari Bakhsh v. Babu Lal*.

32. ('40) 27 A.I.R. 1940 P. C. 230 : I.L.R. (1940) Lah. 685 : I. L. R. (1940) Kar. P. C. 447 : 67 I. A. 464 : 191 I. C. 548 (P. C.), *Punjab Co-operative Bank v. Commissioner of Income-tax*.

33. (1901) 1901 A. C. 495 : 70 L. J. P. C. 76 : 85 L. T. 289 : 50 W. R. 139, *Quinn v. Leatham*.

utilized for the purpose of deciding this case.

[44.] **Munir J.** — I agree and have nothing to add.

[45.] **Mohammad Sharif J.** — I concur.

[46.] **Teja Singh J.** — The question for decision by the Full Bench is one of law and reads as follows :

[47.] "Where in a suit for dissolution of partnership, rendition of accounts and recovery of such amount as may be found due, the plaintiff, under S. 7 (iv) (f), Court-fees Act, values the relief sought in the plaint at a certain figure and a preliminary decree is passed dissolving the partnership, fixing the shares of the parties and directing accounts to be taken and the defendant appeals from the decree, is it open to the defendant to fix the value of the appeal at different figure for purposes of court-fee under S. 7 (iv) (f) or some other provision of the Court-fees Act?"

[48.] The Court-fees Act was enacted in 1870 and the interpretation of some of its provisions has always offered difficulty. Efforts have been made to amend it from time to time but these amendments have not kept pace with the amendments of the Civil Procedure Code, and this fact has added to the difficulty of interpreting certain sections of the Act. Chapter 2, comprising of ss. 3, 4 and 5, deals with fees in the High Courts and in the Courts of Small Causes in the Presidency Towns. The marginal note of S. 3 would denote that it lays down the law for the levying of fees in High Court on its original side and in the Presidency Small Cause Courts, but in reality it relates to the manner in which the fees leviable in the said Courts are to be collected. In A.I.R. 1931 Mad. 457³⁴ Venkatasubba Rao J. while commenting upon this section and the drafting of the Act in general observed that "this is a most clumsily worded and badly drafted section and the Court-fees Act is full of defects and imperfections. Section 4 provides that no document of any of the kinds specified in Sch. 1 or Sch. 2 of the Act, as chargeable with fees, shall be filed, etc., or shall be received or furnished, by the High Court in any case coming before such Court in the exercise of its jurisdiction of the kinds mentioned in the section, "which includes jurisdiction as regards appeals from subordinate Courts, unless in respect of such document there be paid a fee of an amount not less than that indicated by either of the said schedules as the proper fee for such document. Schedule I gives the table and rates of *ad valorem* fees and Sch. II of fixed fees.

Article 1 of Sch. I and Art. 17 of Sch. II relate *inter alia* to a plaint and memorandum of appeal. The scope of Art. 17 is limited to particular kinds of suits specified therein, and it has no application to the present case. Article 1 of Sch. I which is of residuary and general character provides that *inter alia* a plaint or a memorandum of appeal (not otherwise provided for in the Act) presented to any civil Court except those mentioned in S. 3 shall be liable to *ad valorem* fees, at the rates given in the last column of the Article, according to the amount or value of the subject-matter in dispute. At first sight the wording of the Article would suggest that the documents presented in a High Court are excluded from its operation but this interpretation does not appear to be correct. I am supported in the view by the observations made by Dawson Miller C. J., in 4 Pat. 336.³⁵

[49] Now Art. 1, though it makes mention of the value of the subject-matter in dispute, is silent as to how that value is to be determined. This is dealt with by S. 7 of the Act. The opening words of the section are "the amount of fee payable under this Act in the suits next hereinafter mentioned shall be computed as follows." Then follow 11 clauses relating to different kinds of suits. Clause (iv) relates to suits (a) for moveable property where the subject-matter has no market value, as, for instance, in the case of documents relating to title, (b) to enforce the right to share in any property on the ground that it is joint family property, (c) to obtain a declaratory decree or order, where consequential relief is prayed, (d) to obtain an injunction, (e) for a right to some benefit (not otherwise provided for) to arise out of land, and (f) for accounts. It lays down that

[50.] "In all these suits the amount of fee shall be computed according to the amount at which the relief sought is valued in the plaint or memorandum of appeal."

[51.] At the end of the clause appear the words: "in all such suits the plaintiff shall state the amount at which he values the relief sought." It may be mentioned that this is the only clause of S. 7 which refers specifically to a memorandum of appeal. In all other clauses as also in the first part of the section the word mentioned is "suit".

[42.] Before I say something about the significance of the difference between the wordings of this clause and the other clauses, I may point out that S. 7 is included in Chap. 3 the

34. ('31) 18 A.I.R. 1931 Mad. 457 : 132 I. C. 647, Abdul Hakim Sahib v. Chattanadha Iyer.

35. ('25) 12 A. I. R. 1925 Pat. 392 : 4 Pat. 336 : 87 I. C. 137 (F.B.), Krishna Mohan Sinha v. Raghunandan Pandey.

heading of which is "Fees in other Courts and in public offices" and it can be urged that this section cannot apply to a High Court. The marginal note of S. 6 which is the first section of Chap. 3 is "fees on documents filed, etc., in mofussil Courts or in public offices." This section is analogous to S. 4, the difference being that whereas that section applies to High Courts and Presidency Small Cause Courts, S. 6 applies to other Courts. Can it, therefore, be said that S. 7 also applies only to the subordinate Courts? My opinion is that the answer to the question must be in the negative and the reasons for my coming to this conclusion are: (1) that no other section of the Court-fees Act lays down the rules for the determination of the value of the subject-matter of dispute in appeals coming up before a High Court and to hold that S. 7 does not apply to a High Court would be rendering S. 4 altogether nugatory and (2) that ordinarily an appeal being a continuation of the suit out of which it arises, the word "suit" would cover both proceedings in the original Court and the appeal. I may also add that in spite of the heading of Chap. 3 some of the sections comprised therein apply, and must have been intended to apply, to a High Court. Take for example S. 8 which deals with fee on a memorandum of appeal against an order relating to compensation. Then there is S. 12. It is laid down in cl. (i) of that section that every question relating to valuation for purposes of any fee chargeable on a plaint or memorandum of appeal shall be decided by the Court in which such plaint or memorandum of appeal, as the case may be, is filed and such decision shall be final as between the parties to the suit. There is definite mention of memorandum of appeal in the clause and I cannot think that the Legislature intended that the operation of it should be confined to the subordinate appellate Courts and that it should not extend to the High Court which is the final Court of appeal in this country. The words of cl. (ii) of the section are still clearer and put the matter beyond the pale of controversy. The clause says:

[53] "But whenever any such suit comes before a Court of appeal, reference, or revision, if such Court considers that the said question has been wrongly decided . . . it shall require the party by whom such fee has been paid to pay so much additional fee as would have been payable had the question been rightly decided, etc."

[54] Now according to the Civil Procedure Code, High Court is the only Court that can entertain a reference or revision and there

can be no doubt that the clause is intended to apply to it. In my judgment, therefore, in order to be able to determine the amount of court-fee payable on a memorandum of appeal presented to a High Court we must first find the value of the subject-matter in dispute and since the appeal arises out of a suit for accounts, the decision of the question must depend upon the interpretation of cl. (iv) of S. 7. As I have already mentioned, in all clauses of S. 7 other than cl. (iv) mention is made of only "suit." This indicates that in all cases coming within the scope of those clauses the rule for finding out the subject-matter of dispute in an appeal is the same as in a suit. Take for example cl. (i) which relates to suits for money. The plaintiff brings a suit for the recovery of Rs. 5000. He will have to pay court-fee on that amount. If his suit is dismissed in entirety and he prefers an appeal the court-fee payable on the memorandum of appeal will be the same as on the plaint. In case the plaintiff is granted a decree for Rs. 3000 and he wishes to appeal for the part of his claim disallowed by the trial Court he will pay court-fee on that part only. Similarly, if the suit is decreed, say only for Rs. 2000 and the defendant appeals he will pay court-fee on Rs. 2000 only. The same principles would apply to suits coming under other clauses and the amount of court-fee payable on a memorandum of appeal arising out of them would be the same as, or different from, paid on a plaint according as the value of the subject-matter in appeal is the same as, or different from, that in the suit. In none of these clauses, I mean clauses other than cl. (iv), it is laid down that the value of the relief sought shall be stated either in the plaint or in the memorandum of appeal. A different method was, however, adopted with regard to cl. (iv) and an innovation was introduced therein by laying down that the amount at which the relief sought is valued should be stated in the plaint as well as the memorandum of appeal and it is on that value that court-fee is to be paid. The appellant's counsel contended that in view of the definite mention of memorandum of appeal in an appeal arising out of an account suit the same right and privilege are extended to the appellant as to the plaintiff and it is open to him to value his relief in the memorandum of appeal regardless of the amount at which it was valued by the plaintiff in the plaint. The counsel for the Crown relying on the last words of the clause argued that the right to

value his relief, at whatever figure he liked, was given only to the plaintiff and the appellant, whether he be the plaintiff or the defendant, is bound by that valuation. I am prepared to agree that in an ordinary case unless the subject matter in appeal is different from that in the suit, the value of appeal must be the same as that of the suit both for purposes of court-fee and jurisdiction and the fact that the plaintiff is the appellant or the defendant would not make any difference. But here we have to consider a particular kind of suit governed by cl. 7 (iv) in which, this much is admitted at least, that the plaintiff has been given the right to value his relief arbitrarily. To accept the interpretation placed upon the clause by the Crown counsel would, in my judgment, be tantamount to holding that the words "memorandum of appeal" mentioned in the clause are superfluous and such an interpretation would offend against one of the fundamental principles of construction of a statute. No doubt there is no express mention of the appellant in the last sentence of the clause, but since reference is made to the memorandum of appeal in the sentence immediately preceding it, I believe that while considering an appeal the word "plaintiff" should be regarded as synonymous with appellant.

[55] It was argued by counsel for the Crown that the above-mentioned construction of S. 7 (iv) would entail the following undesirable results: (1) That when the defendant is the appellant it would be open to him to change the venue of appeal by valuing his relief in the appeal differently from that given in the plaint even though the subject-matter of dispute in appeal be the same as that in suit; and (2) that it will result in loss in Government revenue inasmuch as the appellant will be entitled to give any value of his relief regardless of the real value of the subject-matter of dispute. In my opinion, there is no substance in these contentions. With regard to the venue of appeal, so far as this Province is concerned it is determined by S. 39, Punjab Courts Act, and it depends not on the amount at which the appellant may value his relief in appeal but upon the value of the original suit. Reference may also be made to the Full Bench decision of this Court, 15 Lah. 151.³⁶ As regards the loss in Government revenue, if the law allows a litigant to value his relief at whatever

figure he likes the Court cannot object to his valuing it at a low figure: see 111 P. R. 1913.³⁷ Then if the law is to be enforced despite the fact that it causes hardship to the subject, the fact that it will cause a loss in Government revenue can hardly be a reason for not enforcing it. Further it should be remembered that in a suit for accounts the value of the relief sought given in the plaint is only a tentative one and not the real value. I shall now deal with the case law on the point.

(56) *Allahabad* — The High Court of Allahabad has always been of the view that a defendant appealing from a preliminary decree in a suit for accounts is at liberty to value his relief at any figure he likes and is not bound by the valuation given in the plaint: see 32 ALL. 517,¹³ 44 ALL. 542,³ A.I.R. 1937 ALL. 465¹⁴ and 47 ALL. 756.¹² The last mentioned case was decided by Sulaiman and Boys JJ. and is a leading authority on the point so far as that Court is concerned. The main judgment was written by Sulaiman J. who discussed a large number of cases of his Court as well as of other Courts and after pointing out that in cases coming under S. 7 (iv) the valuation made by the plaintiff of the subject-matter in dispute is often an arbitrary one and particularly in a case falling under sub cl. (iv) (f) the valuation is a tentative one, he observed as follows:

(57) "If under such circumstances the plaintiff fixes a figure arbitrarily and at haphazard which he considers may be found due on account being taken there is no just ground why the defendant, when appealing, should be tied down to this haphazard estimate when, on the face of it, the valuation is merely tentative."

(58) He referred to the inconvenience which this interpretation of the section might cause and the embarrassment to which the absence of uniformity was likely to result in, but said "that the result is due to the drafting of the section as it stands." Boys J. delivered a separate judgment agreeing with the conclusion arrived at by Sulaiman J.

(59) *Madras* — The view of the Madras High Court is to the contrary. The first important decision is 23 Mad. 490.²⁹ The plaintiff brought a suit for a declaration that a sale deed had been obtained by fraud and was invalid. He valued his relief at Rs. 800 but was ordered to raise the valuation to Rs. 2000. The defendant appealed. It was held that the case was governed by S. 7 (iv) (c) and he was bound to accept the plaintiff's valuation. There was no discussion nor were

36. (34) 21 A.I.R. 1934 Lah. 488 : 15 Lah. 151: 151 I.C. 641 (F.B.), *Kalu Ram v. Hanwant Ram*.

37. (13) 111 P. R. 1913 : 22 I. C. 503 (F.B.), *Barru v. Lachman*.

any cases referred to. The learned Judges merely remarked that S. 7 (iv) (c) must be taken to apply and the case was one in which the valuation given by the plaintiff was the valuation to be accepted. 39 Mad. 725⁹ was a decision of three Judges. It appears that a large number of cases were cited before their Lordships but they did not consider it necessary to discuss them. The matter was disposed of by Wallis C. J., who delivered the judgment of the Full Bench in the following words :

(60) "The decision in 23 Mad. 490²⁰ has been consistently acted on and is in accordance with the decision in 15 Beng. L. R. 167³⁸ and 13 C. W. N. 815.³⁹ We are not prepared to differ from it, and are of opinion accordingly that the appellant is bound by the valuation in the plaint."

(61) In 56 Mad. 705⁶ a Division Bench followed 9 Rang. 165⁵ and held that in appeals arising out of suits for accounts and partition the appellant, whether he be the defendant or the plaintiff, is in the position of a plaintiff and he can file the appeal on any valuation he likes and pay court-fee on it. This case was, however, overruled by a Bench of five Judges in I.L.R. (1938) Mad. 598.¹¹ To start with Leach C. J., who delivered the judgment of the Full Bench, observed that the Courts of India had always regarded S. 7 (iv) (f), Court-fees Act, as applying to appeals by defendants as well as to appeals by plaintiffs, but whether there was justification for including defendants was open to question. Then after pointing out that at the time the Court-fees Act was passed the Civil Procedure Code in force then did not contemplate an appeal from a preliminary decree in a suit for an account and after referring to S. 11 and the last sentence of cl. (iv) (f) he observed that

"the wording of the clause and of S. 11 read in the light of the history of the section certainly does suggest that the defendant was not within the contemplation of those who were responsible for the drafting of the Act."

Then he said:

(62) "Assuming this to be in fact the case, it would not follow that a defendant-appellant would escape payment of a court-fee. Section 4 or S. 6 read with Art. 1 of Sch. I could be called in aid to prevent this, and a defendant-appellant would here find no loop hole for placing an arbitrary value on his relief."

[63] He considered *inter alia* 47 ALL. 756¹² and other cases and concluded by saying that "after careful consideration, we have come to the conclusion that the Full Bench decision of this Court in 39 Mad. 725⁹

38. ('75) 15 Beng. L. R. 167 : 23 W. R. 453, Delroos Banoo Begam v. Ashgur Ally Khan.

39. ('09) 1 I. C. 670 : 13 C. W. N. 815, Bunwari Lal v. Daya Sunker Misser.

should not be disturbed" and that that case would continue to govern the practice in their Presidency with regard to appeals by defendants from preliminary decrees in suits for account. No doubt the learned Judges did go into the merits of the different interpretations placed upon S. 7 (iv) (f), if I may say so with all respect, the thing that weighed with them mainly was the practice that had been prevailing in their Court. I.L.R. (1938) Mad. 1031⁴⁰ is a case decided by a Full Bench of three Judges. The plaintiff's suit for account had been dismissed and he preferred an appeal. The learned Judges observed that in their opinion the scheme of the Act was to allow a plaintiff to value his relief at the figure he chooses, but it did not allow him to change that valuation for purposes of the appeal. A. I. R. 1940 Mad. 878⁴¹ was decided by a Division Bench consisting of Venkataramana Rao J. and my learned brother Abdur Rahman J. In this case too the plaintiff was the appellant. He claimed two reliefs : (1) an account of a certain business and (2) a declaration. The suit was dismissed in entirety. In appeal, the relief as to account was valued at the sum of Rs. 1000 on the ground that the appellant was entitled to put his own valuation according to 56 Mad. 705.⁶ The learned Judges did not accept this contention and held that in view of the latest ruling of their Court, i. e., I.L.R. (1938) Mad. 1031,⁴⁰ the plaintiff was bound to stamp his memorandum of appeal according to the full amount of the valuation in the plaint and since he was not prepared to pay the deficit court-fee or to abandon his claim in respect thereof they dismissed the appeal so far as the relief for account was concerned.

[64.] *Bombay*³.— In 52 Bom. 904¹⁵ there were certain observations made by Baker J. which show that he did not accept the principle laid down in 44 ALL. 542³ and he preferred to follow 39 Mad. 725.⁹ But the correctness of this view was doubted in A. I. R. 1935 Bom. 212¹⁶ and it was held that it should be taken to be overruled by the decision of their Lordships of the Privy Council in 10 Lah. 737.¹⁷

[65.] *Calcutta* — Of the two Calcutta cases cited before us, 13 Cal. 162⁴³ has no bearing upon the point that we have to de-

40. ('38) 25 A. I. R. 1938 Mad. 887 : I. L. R. (1938) Mad. 1031 : 178 I. C. 159 (F. B.), Narayanan Chetty v. Periappan.

41. ('40) 27 A. I. R. 1940 Mad. 878 : 193 I. C. 597, Sampathi Rayudu v. Venkata Ratnam.

42. ('86) 13 Cal. 162, Ahmed Mirza Sahib v. Thomas.

termine. 57 Cal. 463¹⁹ was a suit for accounts. It was valued by the plaintiff at Rs. 1000 for purposes of court-fee. A final decree for Rs. 6418 was eventually passed in the plaintiff's favour. The defendants preferred an appeal to the High Court and the question was what court-fee they were liable to pay. The following observations were made by Rankin C. J.:

[66.] "It appears to me to be *prima facie* clear that the amount payable upon this memorandum of appeal is governed by the same words that governed the plaintiff's liability to pay court-fee when he brought this suit. It is governed by cl. (f), sub-s. (iv) of S. 7, Court-fees Act. Suits for account according to the amount at which the relief sought is valued in the memorandum of appeal....."

[67.] *Rangoon* — The High Court of Rangoon has also followed the Allahabad view, 9 Rang. 165.⁵ This was a decision by five Judges. Page C. J., who delivered the judgment of the Full Bench, referred to the remarks made by Lord Tomlin in 10 Lah. 737¹⁷ and observed that they were in consonance with the judgment of the Judicial Committee which was delivered by Lord Shaw and in his opinion the case was conclusive upon the question that had been referred to the Full Bench.

[68.] *Patna* — There was previously divergence of opinion in the Patna High Court. In 3 Pat. 146²¹ Jwala Prasad J. accepted the Allahabad view. James J. expressed a different opinion in A. I. R. 1930 Pat. 605²² and then in 10 Pat. 458.²³ In 14 Pat. 658²⁴ the plaintiff brought a suit for dissolution of partnership and rendition of accounts and valued it tentatively at Rs. 70,000. The Subordinate Judge passed a preliminary decree and the defendant preferred a first appeal to the High Court. The memorandum of appeal was valued at Rs. 10,000 only. The Stamp Reporter relying upon 10 Pat. 458²³ called upon the appellant to pay court-fee on Rs. 70,000. The question was eventually referred to a Special Bench consisting of Wort, Khaja Mohammad Noor and James JJ. A large number of cases including 10 Lah. 737¹⁷ were cited before their Lordships. Wort J. followed the Allahabad view and held that a defendant appealing against a preliminary decree is at liberty to place his own valuation on the memorandum of appeal but added that that valuation must not be arbitrary. He also held that the Court is not precluded at a later stage from deciding on sufficient materials that the memorandum has in fact been undervalued and calling upon the defendant to

correct his valuation. James J. held that the value placed on a memorandum of appeal must not be an arbitrary valuation and in all ordinary cases coming under S. 7 (iv) (f), Court-fees Act, a defendant preferring an appeal from the preliminary decree should not be permitted to value his appeal at anything less than the valuation in the plaint (provided of course that he is appealing from the whole decree), unless he can demonstrate that there is valid ground for holding that the plaint was deliberately overruled. At the same time he agreed with the conclusion of Wort J. that in the case before them the memorandum of appeal should be admitted, because in his opinion, it was

"one of the rare cases in which the appellant has been able to make out a ground to support his argument that the plaintiff has set an unduly high valuation on his suit, possibly for the purpose of embarrassing the defendant if he desires to appeal from the preliminary decree."

Khaja Mohammad Noor J. appended the following note after the judgment of Wort J.:

[69.] "I agree. In my opinion, under S. 7 (iv) (f) a defendant appealing against a preliminary decree in a suit for account need not accept the tentative valuation of the plaintiff. He may put his own value on the appeal. But this valuation should not be arbitrary. I have read the judgment which my brother James is about to deliver and I agree with him that ordinarily the value of the claim as given by the plaintiff in his plaint is to be the basis of the appeal. There may, however, be cases, the present is one of those, where the defendant's valuation should be accepted. The Court can always call upon the appellant to correct the valuation and pay additional court-fee."

[70.] It will thus be seen that on the question of principle whether the defendant is bound to accept the valuation of the plaintiff and whether he has a right to put his own valuation on the relief sought in the memorandum of appeal preferred by him, Khaja Mohammad Noor and Wort JJ. were of one mind, that is to say, the majority opinion was in accordance with the view of the Allahabad High Court.

[71.] *Nagpur* — A. I. R. 1933 Nag. 127²⁵ and A. I. R. 1943 Nag. 13²⁶ are two cases from Nagpur. Both were appeals by defendants from preliminary decrees in suits for partnership accounts. In the first case 47 ALL. 766¹² was followed and in the second 18 Lah. 196,¹⁰ mention of which will be made later on. In neither case there was any discussion. It may also be mentioned that no reference to the 1933 case was made in the later case.

[72.] *Sind* — The Judicial Commissioner's Court, Sind, has followed the Madras

view (A. I. R. 1921 Sind 149,²⁷ A. I. R. 1927 Sind 100²⁸ and 79 I. C. 582.²⁷)

[73.] Before I come to the Punjab I think it will be convenient to take up the Privy Council case, 10 Lah. 737,¹⁷ which has been referred to and discussed in several cases. It was a suit for rendition of accounts and the settlement of the sums due thereon in connection with a partnership and was valued in the plaint at Rs. 3000 for the purposes of court-fees. Defendant 1 challenged the shares as given by the plaintiffs and asked for dismissal of the suit. He further asked that a decree for Rs. 29,000 be passed in his favour. The trial Court granted the plaintiffs a preliminary decree determining the respective shares of the parties in the partnership and ordering accounts to be taken. No appeal was preferred from the preliminary decree by any of the parties. After the accounts had been gone into, the trial Court passed a final decree for Rs. 19,991 with costs, etc., in favour of defendant 1 and against the plaintiffs. No sum was found due to the plaintiffs at all. Both parties preferred appeals to the Judicial Commissioner's Court. The plaintiffs challenged the decree against them for over Rs. 19,000 and maintained that that sum in whole or in part should be disallowed, and that their own claim of Rs. 3000 or less or more should be granted in their favour. They valued the appeal for the purposes of court-fee at Rs. 19,991 and paid the court-fee of Rs. 975. The Judicial Commissioner's Court remanded the matter for a re-trial but ordered that the plaintiffs should not have a decree for any sum which might be found due to them, since in its view the court fee paid did not cover that relief and to that extent the appeal was then barred by time. The plaintiffs went in appeal to the Privy Council. Lord Tomlin made the following observation while the case was being argued :

[74.] "In S. 7 the amount of the fee is to be computed, in suits for accounts, according to the amount at which the relief sought is valued in the plaint or memorandum of appeal. If, therefore, the appellant values the relief in the memorandum of appeal, and pays a fee thereon, that is the amount of fee properly payable. Of course, if the appellant recovers more, he pays the extra fee under S. 11 of the Act. But you cannot complain that the amount valued in the memorandum of appeal is not the proper amount. In suits for accounts it is impossible to say at the outset what exact amount the plaintiff will recover. The Legislature, therefore, leaves it open to him to estimate the amount. That is the scheme of the Act."

[75.] Lord Shaw, who delivered the judgment of their Lordships, accepting the appeal and remanding the case to the trial

Court for decision on merits, made the following remarks on the question of court-fees:

[76.] "It is only necessary to observe that this applied to a valuation of the appeal in its entirety, that is to say, both for the purpose of reversing the decree against the appellants and for granting the decree in their favour.

[77.] The court-fee due upon the appeal valued as an entirety as thus stated was Rs. 975, and that was duly paid.

[78.] Their Lordships find no reason for treating that payment either as upon an under value or a split value. Their Lordships think, with much respect to the Judicial Commissioner, that it was a mistake to treat the payment of Rs. 975 as a fee made only on the amount of the decree passed against the appellants. That amount, as already stated, may be not only in full but largely in excess of the true sum of relief at which a sound valuation could in the present circumstances be said to reach and it covered the appeal as a whole, including that sum on the one hand and a much smaller figure of Rs. 3000 on the other.

[79.] Their Lordships are clearly of opinion that the memorandum of appeal in the present case did state in terms of the Act the amount at which the relief was sought. This determines the appeal . . ."

[80.] It will be seen that two distinct reliefs were claimed by the plaintiffs in their appeal before the Judicial Commissioner: (1) that the final decree for Rs. 19,000 odd, passed against them, should be set aside and (2) that after going through the accounts properly a decree for Rs. 3000 or whatever amount was found due, should be passed in their favour. Now, S. 17, Court-fees Act, lays down that where a suit embraces two or more distinct subjects, the plaint or memorandum of appeal shall be chargeable with the aggregate amount of the fees to which the plaints or memoranda of appeal in suits embracing separately each of such subjects would be liable under this Act. Had this been an ordinary appeal, according to S. 17 the plaintiffs would have had to pay court-fees on both the reliefs sought by them. Their Lordships by holding that the plaintiffs were right in valuing their appeal as an entirety laid down that even a final appeal from a suit for accounts is governed by the provisions of S. 7 (iv), provided the relief sought in the appeal includes rendition of accounts. They should also be taken to have held that in an appeal of that kind it is open to the appellant, even though he be the plaintiff, to value his relief at any figure that he liked.

[81.] *Lahore* — The earliest case of this Court is A. I. R. 1926 Lah. 189³ in which 44 ALL. 542³ was followed. A.I.R. 1931 Lah. 143⁸ is also a Single Bench case, decided by Addison J. He followed 7 P.R. 1915.¹ Apparently the previous case was not brought to

his notice. A.I.R. 1936 Lah. 458⁴ related to a suit for dissolution of partnership and settlement of accounts. A preliminary decree was passed and a commissioner was appointed to examine the accounts of the parties and to submit a scheme for the winding up of the partnership business, which was carried on at three places including Muzaffarnagar. The books relating to the Muzaffarnagar business were not produced before the commissioner and the plaintiff's contention all along was that they were with the defendants. The trial Court came to the conclusion that the books were in possession of the plaintiff and passed a final decree, in accordance with the commissioner's report, directing *inter alia* that the business of the partnership should continue. The plaintiffs appealed to this Court. In the trial Court, the suit had been valued for purposes of court-fee at Rs. 1300. In appeal, the valuation was raised to Rs. 5,250. The Bench (Jai Lal and Sale JJ.) relying upon 10 Lah. 737,¹⁷ 9 Rang. 165⁵ and 56 Mad. 705⁶ held that the provisions of S. 7 (iv) (f) and S. 11, Court-fees Act, also apply to appeals and the plaintiff-appellant was within his rights in fixing the value at the figure he liked.

[82] In A.I.R. 1936 Lah. 879⁷ the plaintiff brought a suit for accounts and administration and fixed the value for purposes of court-fee and jurisdiction at Rs. 130. The defendants accepted this valuation. The trial Court passed a preliminary decree with the parties' consent and it was agreed that the details of the properties should be determined before the final decree is passed. No preliminary decree was, however, drawn up but the Court appointed a Receiver and directed him "first to determine the assets and liabilities of the estate and report on what lines he proposed to work." Later on, the case was taken up by the trial Court itself. It framed issues covering the points in dispute between the parties and re-appointed the previous Receiver as the Receiver of the disputed properties because it thought that the appointment made before had terminated. At the same time it passed an order disposing of the issues and holding certain properties to be part of the estate of the deceased. One of the parties appealed to this Court and the other put in cross-objection. Court-fees both on the memorandum of appeal and the cross-objections were paid on Rs. 130. The taxing officer objected that the proper court-fee had not been paid. Jai Lal J. with whom Dalip Singh J. concurred, made the following observations :

[83] "As I have already stated the value of the suit for the purposes of court-fee and jurisdiction was admitted by all the parties to be Rs. 130 in the trial Court, and as in a suit for accounts including an administration suit, and in an appeal from a decree in such a suit a plaintiff or an appellant is entitled to value his relief for the purposes of court-fee at such figure as he may fix, a matter which was conceded by all the parties before us, we overruled this preliminary objection."

[84] This case was followed by Skemp J. in 42 P.L.R. 101.⁴³ I.L.R. (1937) 18 Lah. 196¹⁰ is a decision by a Division Bench to which my learned brother Din Mohammad was a party. The plaintiff brought a suit for dissolution of partnership and rendition of accounts and obtained a preliminary decree. He valued his relief in the trial Court at Rs. 5250. The defendants appealed to the High Court from the preliminary decree and though they valued the appeal for purposes of jurisdiction at Rs. 5250 they fixed the valuation for purposes of court-fee at Rs. 130 and paid the fee thereon. It was held that the appeal must bear court-fees *ad valorem* on Rs. 5250. The judgment of the Bench was delivered by Addison J. He discussed a number of cases and while referring to the Allahabad High Court and the other Courts, which accept the view of that Court, said :

[85] "These Courts were aware that such a decision would give rise to many anomalies. Amongst others, this appeal is before this Court because the value for purposes of jurisdiction as fixed by the plaintiff was over Rs. 5000, but as the value is only Rs. 130 according to the defendant, the appeal should have been heard by a Subordinate Judge."

[86] I may here observe with all respect that so far as the venue of appeal is concerned the view of the learned Judge militates against the express provision contained in S. 39, Punjab Courts Act, mentioned above. This is what he said regarding the Privy Council case :

[87] "We have carefully considered the decision in 10 Lah. 737¹⁷ and do not think that it has any application to the present case. That was a suit in which there was a final decree and the plaintiffs appealed against the decree passed against them in favour of the defendants and valued the appeal at the amount decreed in favour of the defendants. All that their Lordships decided was that they were justified in doing so"

[88] This will show that the majority of the High Courts support the Allahabad view. Sind Judicial Commissioner's Court follows the Madras High Court. Opinion in Nagpur and in our Court is divided. No doubt the appellant in 10 Lah. 737¹⁷ was the

43. (40) 42 P. L. R. 101, Shri Govind Lalji v. Milapchand.

plaintiff, but the observations of their Lordships in that case can be construed, and have been construed by most of the High Courts, as laying down a principle which is also applicable to an appeal by a defendant.

[89] Before concluding I would like to add one other word. The Court-fees Act is a fiscal enactment and it is a well recognised principle of interpretation of statutes that a fiscal enactment should be construed strictly and whenever there is an ambiguity the benefit of the doubt should be given to the subject. If any authorities be needed in support of this proposition reference may be made to 47 ALL. 756,¹² A. I. R. 1928 Pat. 85⁴⁴ and A. I. R. 1936 Mad. 420.⁴⁵ The mere fact that there is a very serious conflict of opinion as regards the interpretation of S. 7 (iv) and the effect of the use of the words "memorandum of appeal" in the penultimate sentence of the clause shows that the matter is not free from doubt. Accordingly I venture to think that for this reason alone the clause should be interpreted in favour of the appellant and it be held that where the appellant is the defendant he should be free to value his memorandum of appeal regardless of the plaintiff's valuation in the plaint. The defect in the wording of the clause is of such a nature that it can be removed only by the Legislature and not by the Courts. I have had the advantage of reading the judgment that my learned brother Abdur Rahman proposes to deliver. With profound respect and for the reasons mentioned above I am unable to accept his opinion. I would hold that the question referred to the Full Bench should be answered in the affirmative.

N.S./D.H.

Answer accordingly.

44. ('28) 15 A. I. R. 1928 Pat. 85 : 105 I. C. 108, Damodar Prasad v. Masudan Singh.

45. ('36) 23 A. I. R. 1936 Mad. 420 : 59 Mad. 739; 162 I. C. 175, In re R. R. Gopalchari.

[Case No. 57.]

A. I. R. (33) 1946 Lahore 298

TEJA SINGH AND MOHAMMAD
SHARIF JJ.

Rattu Jowala Singh and others
Convicts — Appellants

v.

Emperor.

Criminal Appeal No. 922 of 1945, Decided on 4th January 1946, from order of Sessions Judge, Jullundur, D/- 8th October 1945.

Penal Code (1860), S. 302 — Sentence — All accused participating in assault on deceased—Beating given by them merciless—Proper sen-

tence is one of death even though who of them gave fatal blow is not known.

Where a Judge has come to the conclusion that all the accused participated in the assault upon the deceased and the beating given by them was merciless, the fact that he cannot definitely say who of them gave the fatal blow should not weigh with him in not awarding the sentence of death which is the normal penalty for an offence of murder.

[P 301 C 1]

J. G. Sethi, and R. L. Kohli — for Appellants.
Kartar Singh and Gurdev Singh for Advocate-General — for the Crown.

Teja Singh J.—The village Sindher in the district of Jullundur was the scene of three incidents on 28th May 1945. Sham Singh was brutally wounded in the village lane, at a short distance from his residential house and he succumbed to his injuries in the early hours of the morning. Bishna was set upon and injured outside the village *abadi*. Bachittar Singh was killed and three of his relatives, namely, Kartara, Gujjar Singh and Sher Singh were injured at their well which is about half a mile from the village. Sher Singh, one of the injured persons, went to the police station about seven miles distant and lodged the report at 6-30 A. M. on the 29th. The Sub-Inspector reached the village about 10 A. M. At about 2 in the evening he took down the statement of Mt. Iso, daughter of Sham Singh, relating to the first incident and registered a separate case. After investigation the police sent up three cases: (1) under Ss. 148 and 302 read with S. 149, Penal Code, against Ratna, Bachna, Gopal Singh and Indar Singh in respect of the first incident, (2) under S. 326, Penal Code, against Indar Singh and Puran Singh in respect of the second incident, and (3) under Ss. 148 and 302 read with S. 148, Penal Code, against Indar Singh, Gopal Singh, Bachna and Puran Singh. All the three cases were tried by the Sessions Judge, Jullundur. The second case failed and the accused in it were acquitted. The other cases ended in the conviction of the accused. Appeal No. 922 of 1945 by Rattu, Bachna and Gopal Singh and Appeal No. 932 of 1945 by Indar Singh arise out of the first case. They were all convicted under S. 302, Penal Code, and were sentenced to transportation for life each. The appeal from the third case is being disposed of by a separate order.

The prosecution version in brief is that the party of the accused consisted of seven persons out of whom five only were identified and they are Ratna, Bachna, Gopal Singh, Indar Singh and Puran Singh. The remaining two were strangers to the witnesses and hence their identity could not be

established. It was some time before sunset that they went to the house of Sham Singh, but he was not there. They then went along the lane, came across Sham Singh near the shop of one Buta Brahman and attacked and injured him. From there they went to Sher Singh's well and on the way they attacked Bishna. When they reached the well they threw out a challenge to Sher Singh, who was present with the other members of his family. Mehr Singh, Sher Singh's brother, entreated them not to do any harm to them, but they did not listen to him. They first inflicted *lathi* blows upon Bachittar Singh and after killing him they injured Puran Singh, Kartara and Sher Singh. The details of the first incident that resulted in Sham Singh's death are given by his daughter Mt. Iso, who is the principal witness in the case. She averred that the accused party arrived shortly before sunset and called out to her father from outside. Sham Singh had left with his son Jit Singh, a boy of about 12 years, for Buta's shop and as there was no one else in the house Mt. Iso chained the outer door from inside and went up the roof of the *deorhi* to find out who the visitors were. She told them that Sham Singh was away, but since she noticed that some of them were armed with weapons she apprehended that they probably meant to do some mischief and thought of going to her father and warning him. Accordingly she came into the lane—there is some difference between the statement that she made to the police and the one that she made in Court as regards what she exactly did — and eventually went up the roof of the house of one Surain Singh from where she saw her father being attacked by the accused party. The other persons who witnessed the incident were Jit Singh mentioned above and Puran Singh, a nephew of Sham Singh's. After the accused had gone away some of the village people came up and took Sham Singh to his house. We are told that the motive of the crime was that previously Indar Singh appellant was the Sarpanch of the Village Panchayat, but he was removed and his place was taken by Sham Singh deceased. The counsel for the appellants as well as the counsel for the Crown are agreed that there is no material on record to show when the substitution of Sham Singh for Indar Singh happened. The record is also silent regarding the relationship of Indar Singh with the other appellants.

According to the medical evidence Sham

Singh sustained a number of injuries. The doctor, who conducted the *post mortem* examination enumerated the injuries as seventeen but some of them were multiple injuries. There can, therefore, be no doubt that it was a case of homicide and whosoever killed Sham Singh was actuated by enmity of a bitter character. The question, however, to decide is whether the prosecution version as set forth in the above was true. On going through the evidence of the alleged eye-witnesses and on giving most careful consideration to the matter I am constrained to say that the answer must be in the negative. All the three alleged eye-witnesses are unanimous in saying that the occurrence took place some time before sunset. They also aver, and this fact is further proved by the presence of the marks of blood near Buta's shop, that the scene of the tragedy is surrounded by residential houses and shops. Mt. Iso stated that a number of village people visited their house and one of them was Phuman Singh. It is admitted that this Phuman Singh is a bitter enemy of some of the appellants and there has been criminal litigation between them. He was originally cited as one of the prosecution witnesses, but was given up for reasons which are not very clear. It is also in Mt. Iso's evidence that Gujjar Singh, father of Bachittar Singh deceased and one of the persons injured at the well, came to their house on the morning of the 29th and she asked him to make a report to the police on her behalf. Jit Singh no doubt is of youthful age but P. W. Puran Singh is a grown-up man. He gave his age as 30 years. In spite of all these facts it is significant that no information was sent to the police and even the report made by Sher Singh regarding the third incident is silent about Sham Singh's murder. It was urged by Mr. Kartar Singh Chawla, learned counsel for the Crown, that there was a feeling of general panic in the village and accordingly no one could take the courage of proceeding to the police station during the night. In the first place if the statements of the eye-witnesses are true that Sham Singh was attacked before sunset there was considerable time for Puran Singh to set out for the police station. Then all the persons interested in the three incidents could have made a common cause and it should not have been difficult for them to send a sufficient number of people to the police station. Supposing, however, that this was not possible I cannot understand why the report

made by Sher Singh should be silent about the other two incidents and particularly about Sham Singh's murder. There can possibly be two explanations for this: one that the occurrence took place late in the night and second that no one had seen anything and time was required to concoct a plausible story and to prepare witnesses. Now as regards the witnesses. A mere perusal of Mt. Iso's statement is sufficient to convince one that the story narrated by her is made up. She started by saying that Bachna appellant called her out by name and enquired from her where her father was, telling her at the same time that he was wanted by the Sub-Inspector. She told him that he had gone to Buta's shop. After that she changed and this is what she said:

"My suspicion was aroused and in order to ascertain as to who the man was who had called me out I went on the top of the roof of my house and saw Bachna and Rattu accused standing close by the door. Indar Singh and Gopal Singh accused were standing close by the wall. Two more strangers were seen by me . . ."

After this she came down from the roof of her house on the back side and went to Surain Singh's roof through a stair-case because she was afraid that the accused party might follow her father to Buta's shop. She saw her father coming from the side of the shop, but instead of going up to him and warning him of the danger which awaited him she ascended Surain Singh's roof. This is rather strange, because the place where her father was attacked is quite close to the door of Surain Singh's house. According to her, one of her father's assailants had a *takwa*, another had a *kirpan* and the third had a gun. The gunman did not fire. The man who had the *takwa* used the weapon but only the blunt side of it and the man who carried the *kirpan* gave a few blows to the deceased but he did not draw out the *kirpan* but used it with the sheath. In cross-examination she admitted that she first went to Sundar Singh's house, which is contiguous to her house. That house was locked from outside and a girl was standing in front of it. At the request of the witness the girl unchained the door and she went inside. She then came out of that house and went to Surain Singh's house. That house was also locked from outside and Mt. Bachni, another girl who was standing there, unlocked it for the sake of the witness. Apart from the improbability of the houses being locked at the evening time, when it is customary for the zamindars to return to their houses with cattle or fodder

from fields, the statement of the witness on many of the points was quite different from what she had stated to the police. The statement of Jit Singh, the next witness, cannot be taken as serious because of his tender age. There is, however, one thing that might be mentioned about him. He stated before the police that he and his father left for Buta's shop after sunset and after taking their meals and when they reached there Jagar, who was one of the persons present, told his father that he had seen a gunman knocking about in the village and he was afraid that the man might commit a dacoity. His father told Jagar in reply that he had nothing in his house and consequently he could not be afraid of being looted. The witness when confronted with this part of his police statement denied having made it. The statement was properly proved and if it was true it would go to show that probably the offence was committed by a party of strangers.

The last man is Puran Singh. His house is about 100 *karams* from the place of occurrence and he first deposed that he was returning from his well when he happened to see Sham Singh being belaboured. Later on he said that he was informed by some one that his uncle had been attacked and consequently he went running to the spot. But it is strange that he brought no weapon and made no effort to help the deceased. As I have already observed he even did not go to the police to make a report or to seek help from any one in the village. Though according to the witnesses in the other case the third incident also happened at sunset Puran Singh stated that he heard of it after one-fourth of the night had elapsed, that is to say, somewhere between 10 and 11 P.M. He said that he was present when the Sub-Inspector examined the dead body and prepared the inquest report, which was on the morning of the 29th and he affixed his thumb-mark to the report. This is certainly wrong because the report does not bear his thumb-mark. He further stated that he made a statement to the Sub-Inspector at the time he prepared the inquest report and none after that. The Sub-Inspector's evidence is that he recorded Puran Singh's statement on the 30th. Taking into consideration the time and the scene of occurrence one would expect some independent evidence, but that is not forthcoming. Mr. Kartar Singh Chawla explains that very few persons in the villages, who are really independent, come forward to give evidence. This may be so, but since

the evidence actually produced in Court is not reliable it is not possible for the Court to convict the accused. Before concluding I wish to say a word regarding the sentence imposed by the learned Sessions Judge in this case. This is what appears in the last paragraph of his order:

"The question of sentence is of some importance in this case. The facts disclosed at the trial do not make out a case for giving the extreme penalty provided by law to the accused. They unquestionably beat Sham Singh and beat him mercilessly, but it is well nigh impossible to say as to which of them gave the fatal injury. In the circumstances of the case ends of justice will be sufficiently met with if all of them are transported for life under S. 302, Penal Code."

I have no hesitation in saying that the view of the learned Sessions Judge is entirely wrong. After having come to the conclusion that all the accused participated in the assault upon the deceased and the beating given by them was merciless the fact that he could not definitely say which one of them gave the fatal blow should not have weighed with him in not awarding the sentence of death which is the normal penalty for an offence of murder. Then no particular injury in this case was fatal and death was the cumulative effect of all the injuries. It was strenuously argued before us by the learned counsel for the appellants that in spite of the fact that the learned Sessions Judge recorded the conviction of the appellants he refrained from imposing the extreme penalty, which should have been the only appropriate penalty, because in his heart of hearts he was not sure of the appellants' guilt. I cannot say whether the contention is altogether well-founded, but I do wish to observe that whenever I find a Judge awarding a sentence which is highly inconsistent with the gravity of the offence a doubt is raised in my mind whether he was absolutely convinced of the accused's guilt and this appears to me to be a case of that kind. In the result, I would accept the appeal, set aside the appellants' conviction and direct that they be released forthwith.

Mohammad Sharif J.—I agree.

D.S./D.H.

Appeal allowed.

[Case No. 58.]

* **A. I. R. (33) 1946 Lahore 301**

FULL BENCH

ABDUL RASHID, TEJA SINGH AND
BHANDARI JJ.

*In the matter of Ram Lal Anand,
Advocate, Lahore.*

Misc. Case No. 367 of 1945, Decided on 13th
February 1946.

*Legal Practitioners Act (1879), S. 13 and Letters Patent, Cl. 8 (Lah.)—Change of sides by counsel is forbidden if there is confidential communication by one side which may be made use of by counsel in representing opposite side—He cannot obtain his own discharge and act for opposite party — He cannot accept retainer from opposite side without first offering his services to original client — Counsel held was not guilty of professional misconduct in accepting brief of opposite party.

Change of sides as such by counsel is not forbidden by law. Change of sides is forbidden if there are confidential communications by one side which may be made use of when the lawyer represents the opposite party. It is forbidden if the lawyer obtains his own discharge and acts for the opposite party. It is also forbidden if the lawyer accepts a retainer from the opposite party without first offering his services to his original client.

[P 304 C 2]

In the present case, it was held that there were no confidential communications in possession of the counsel which had not already become public property when he accepted the brief for the opposite party. Further, the counsel did not obtain his own discharge. The proceedings in which he was engaged by the party had terminated and the party had refused to avail himself of the services of the counsel. In the circumstances, the counsel was not guilty of professional misconduct in accepting the brief of the opposite party: (1912) 1 Ch. 831, *Rel. on*; (1815) 13 R.R. 183; ('18) 5 A.I.R. 1918 Pat. 265 (S. B.); ('34) 21 A. I. R. 1934 Pat. 352; ('23) 10 A.I.R. 1923 Cal. 106; ('30) 17 A.I.R. 1930 Rang. 355; ('30) 17 A. I. R. 1930 Rang. 185; 2 P. R. Cr. 1904 and ('17) 4 A. I. R. 1917 P.C. 80, *Disting.*

[P 304 C 2]

Anant Ram Khosla, Assistant Legal Remembrancer Punjab and Kirpa Ram Sharma
—for Manak Chand, Petitioner.

R. L. Anand, Advocate, in person.

Abdul Rashid J. — This is an application presented by Manak Chand Mehra, under S. 13, Legal Practitioners Act, and Cl. 8, Letters Patent, praying that disciplinary action may be taken against Mr. Ram Lal Anand, Advocate. The charge which Mr. Ram Lal Anand was called upon to meet is in the following terms:

"That you are guilty of professional misconduct inasmuch as having taken instructions from S. Basant Singh and others and having received their confidence, you filed an application under Ss. 162 and 175, Companies Act, in the High Court of Judicature at Lahore, for the winding up of the Amritsar Exchange Ltd. Amritsar (C. O. 94-43), alleging various acts of fraud against the Directors thereof, and also appeared on behalf of the afore-said petitioners before the Letters Patent Bench to support the winding up order passed by the Hon'ble Liquidation Judge, that subsequently you appeared on behalf of L. Bhagwan Das, one of the Directors of the Company, in petition filed in the High Court of Judicature at Lahore, by the Official Liquidator under S. 196, Indian Companies Act, (C.O. 35-45), and that in doing so you have changed sides, abused the confidence reposed in you by the petitioning creditors, and also misused the instructions conveyed to you by them in the earlier part of the same proceedings.

That the above facts constitute a reasonable cause for your removal or suspension from practice."

The relevant facts of the case may be shortly stated. On 27th July 1943, 21 creditors of the Amritsar Exchange Limited presented an application for the winding up of the Company on a number of grounds. This application was drafted by Mr. Ram Lal Anand. It was stated in this application that the Company and the management of the Company had been guilty of fraud, embezzlement, falsification of accounts and mismanagement. It was prayed that, in view of this serious condition, a provisional liquidator may be appointed to take immediate charge of the records and books including all books containing accounts and minutes. After two or three hearings in the Court of the Liquidation Judge an order was passed by Mohd. Munir J. on 22nd December 1943, ordering the Company to be wound up and appointing the Special Official Receiver of this Court to be the Official Liquidator of the Company. Against this decision the Amritsar Exchange Limited preferred an appeal under cl. 10, Letters Patent. This appeal was dismissed by a Division Bench on 28th April 1944. On 22nd March 1945, Mr. Joshua presented an application for public examination of the Director of the Company regarding their conduct and dealings with the Company. Bhagwan Dass, the Chairman of the Board of Directors, was one of the persons who was sought to be publicly examined. Meanwhile on 2nd January 1945, Bhagwan Dass had approached Mr. Ram Lal Anand and had asked him to appear for him in the misfeasance proceedings that were likely to be taken by the Official Liquidator. He further asked Mr. Ram Lal Anand to draft an application on his behalf stating that he was not guilty of any dishonest practices and that there was no material justifying his public examination. This application was drafted by Mr. Ram Lal Anand and was presented to the Liquidation Judge. This application contained a detailed reply to all the allegations made in the petition against Bhagwan Dass and the other Directors.

On 27th April 1945, the Official Liquidator as well as the Directors, whose public examination was asked for appeared in the Court of the learned Liquidation Judge. The Directors suggested that before any further proceedings are taken on the application of the Official Liquidator for public examination, they should be allowed to furnish an

explanation to the Official Liquidator and that if that explanation is found satisfactory by the Official Liquidator the proceedings for the public examination may be dropped. On that hearing Mr. Ram Lal Anand appeared for Bhagwan Dass, the Chairman of the Board of Directors. His appearance for Bhagwan Dass was objected to by Shivdatt Ram and Mela Ram petitioning creditors. Mr. Ram Lal Anand, however, stated that he was justified in appearing as the Official Liquidator had failed to engage him on behalf of the petitioning creditors. The Liquidation Judge adjourned the proceedings for the public examination, and gave the Directors a chance to explain various matters to the Official Liquidator. After hearing the explanation of the Directors, Mr. P. N. Joshua on 6th October 1945, presented an application to the Liquidation Judge praying that further proceedings in the application for public examination may be ordered to be dropped as its object had been achieved by the examination of the Directors by him. The present petition had meanwhile been filed by Manak Chand, one of the petitioning creditors, on 29th May 1945.

After reading the petition presented by the twenty-one creditors on 27th July 1943, for the compulsory winding up of the Company, I am of the opinion that the petitioning creditors made allegations of dishonesty against all the Directors of the Company and the servants of the Company taking part in the management thereof. This petition, therefore, contains allegations of dishonesty against Bhagwan Dass Mehra. Mr. Ram Lal Anand drafted this petition. The explanation of Bhagwan Dass tendered in Court, when public examination was sought to be resorted to, was also drafted by Mr. Ram Lal Anand. It was contended by the learned Assistant Legal Remembrancer that Mr. Ram Lal Anand had made allegations of fraud against Bhagwan Dass, the Chairman of the Board of Directors, at one stage and at another stage Mr. Ram Lal Anand had drafted the reply of Bhagwan Dass Mehra clearing his character and repudiating all the allegations of fraud made against him. It was urged that Mr. Ram Lal Anand was guilty of professional misconduct as he had changed sides. Originally his position was that of prosecutor of the Directors and later on his position was that of a counsel defending the Directors. It was urged that it was not open to Mr. Ram Lal Anand to change sides in such a manner.

It was maintained that confidential communications had been made to Mr. Ram Lal Anand by the creditors of the Company in July 1943, when he had put in a petition for the winding up of the Company and that in drafting the explanation of Bhagwan Dass, Mr. Ram Lal Anand had made use of the confidential communications made to him by his previous clients in the interests of the client who had engaged him subsequently in the year 1945. The conduct of Mr. Ram Lal Anand, according to the learned counsel for the petitioner, was, therefore, highly improper in the discharge of his duties.

In my opinion, the contention of the learned counsel for the petitioner is devoid of all force. All the confidential communications made to Mr. Ram Lal Anand for the purpose of presenting the winding up petition were embodied by him in his application dated 27th July 1943. No reliable evidence has been placed on the present record that there were any confidential communications other than those embodied in the petition. The statement of Manak Chand petitioner recorded in these proceedings, is worthless and no reliance can be placed thereon. I am, therefore, of the opinion that all the confidential communications made by the petitioning creditors to Mr. Ram Lal Anand had become public property on 27th July 1943, when the winding up petition was presented in the Liquidation Court. Mr. Ram Lal Anand conducted the case of the petitioners till the winding up order had been made by the Liquidation Judge. He charged a fee exceeding Rs. 1000 for these proceedings. The Company preferred an appeal, and Mr. Ram Lal Anand was engaged by the petitioning creditors again, on payment of a fee of Rs. 500. Mr. Ram Lal Anand argued the appeal on behalf of the respondents and the Letters Patent appeal was dismissed. The two engagements of Mr. Ram Lal Anand, therefore, came to an end.

When misfeasance proceedings were contemplated by the Liquidator against the Directors, Bhagwan Dass Mehra approached Mr. Ram Lal Anand. Mr. Ram Lal Anand told Bhagwan Dass that he would charge Rs. 1000 for the drafting of his explanation and Rs. 500 per day for every hearing in Court. On 4th January 1945, Mr. Ram Lal Anand met Mr. Joshua and told him that he had been approached by Bhagwan Dass to take up his case and oppose his public examination. He asked Mr. Joshua whether

he, as Official Liquidator, wanted to retain him for the public examination of the Directors in misfeasance proceedings. Mr. Joshua replied that he had a very small fund in his hands on behalf of the Company and that he was not in a position to pay heavy fees which Mr. Ram Lal Anand was likely to demand. He would not, therefore, require his services. This is evident from the statements of Mr. Joshua and Mr. Ram Lal recorded to-day. Mr. Ram Lal Anand thus gave a notice to his previous clients to retain his services and they declined to do so. Mr. Ram Lal Anand wrote a letter (Ex. 1) to Mr. Joshua on 5th January 1945 asking him to place on record the fact that in the event of his taking misfeasance proceedings against some or all of the Directors of the Amritsar Exchange Limited, he will not be in a position to engage Mr. Ram Lal Anand on behalf of the Company. Mr. Joshua replied the same day stating that he was not prepared to engage Mr. Ram Lal Anand in the contemplated misfeasance proceedings on behalf of the company. It has thus been conclusively established that Mr. Ram Lal Anand offered his services to the Official Liquidator of the Company in respect of misfeasance proceedings and that he was not prepared to accept the brief of the opposite party until the Official Liquidator had refused to retain him.

In this case it is established that on the day when Mr. Ram Lal Anand accepted a retainer from Bhagwan Dass Mehra, he was not in possession of any confidential information conveyed to him by the petitioning creditors or the Official Liquidator. It is further established that before accepting the retainer from Bhagwan Dass Mehra, he offered his services to the Official Liquidator and the Official Liquidator refused to retain him. Mr. Ram Lal Anand after the refusal accepted the retainer from Bhagwan Dass Mehra. The question for consideration is, whether under these circumstances Mr. Ram Lal Anand is guilty of grossly improper conduct in the discharge of his professional duties. The learned counsel for the petitioner relies strongly on the case in (1815) 13 R.R. 183.¹

This case, however, is of no assistance to the petitioner. In this case a solicitor, *by his own act*, had discharged himself from the service of a client and had taken up legal work on behalf of the opposite party. It was held that a lawyer cannot discharge himself by his own act and then go over to the op-
1. (1815) 13 R. R. 183, *Earl Cholmondeley v. Lord Clinton*.

posite party. In the present case, Mr. Ram Lal Anand did not discharge himself by his own act. The winding up proceedings for which he had taken one retainer had terminated with the order of Mohd. Munir J. The Letters Patent appeal for which he had received another retainer had also terminated. The termination of the proceedings led to the discharge of the services of Mr. Ram Lal Anand. The cases where a lawyer ceases to appear for one client and accepts a retainer from the other party while the suit is still pending are inapplicable as in the present case the two proceedings for which Mr. Ram Lal Anand had accepted retainers had terminated. The cases reported in 3 Pat. L. J. 390,² A. I. R. 1934 Pat. 352,³ A. I. R. 1923 Cal. 106,⁴ 8 Rang. 446,⁵ 8 Rang 44,⁶ 2 P. R. Cr. 1904⁷ and 42 I. C. 236,⁸ on which the learned counsel for the petitioner relies, are all distinguishable as in all these cases either the lawyer had discharged himself of his own will and had appeared for the opposite party while the same cause was still pending or had not offered his services to his previous client before taking up a retainer from the opposite party. All the English case law dealing with the subject has been considered in (1912) 106 L. T. 556.⁹ It was laid down in this case that although there may be cases where the circumstances are such that a solicitor who has acted for one side in a particular matter ought not to be allowed afterwards to act for the opposite side in the same matter because he cannot clear his mind of confidential information given to him by his former client, yet no general rule to that effect exists, but whether he will be restrained from so acting or not depends upon the particular circumstances of each case, for the Court ought to treat each case on its own facts and consider whether there is any real mischief to be guarded against. The following observations are of great importance :

2. ('18) 5 A. I. R. 1918 Pat. 265: 3 Pat. L. J. 390: 45 I. C. 684 (S.B.), *Emperor v. Bir Kishore Rai*.
3. ('34) 21 A. I. R. 1934 Pat. 352 : 150 I. C. 16 (S.B.), *In the matter of S. P. a pleader*.
4. ('23) 10 A. I. R. 1923 Cal. 106 : 72 I. C. 22, *Emperor v. Rajani Kanta Ghose*.
5. ('30) 17 A. I. R. 1930 Rang. 355 : 8 Rang. 446 : 128 I. C. 354, *U Ko Ko Gyi v. U San Mya*.
6. ('30) 17 A. I. R. 1930 Rang. 185 : 8 Rang 44 : 125 I. C. 262, *Sein Gyi Maung v. J. Manekjee*.
7. ('04) 2 P. R. Cr. 1904, *Ali Mahomed v. Babu Sham Lal*.
8. ('17) 4 A. I. R. 1917 P.C. 80 : 42 I. C. 236 (P.C.), *Lilian Hira Devi v. Digbijai Singh*.
9. (1912) 1 Ch. 831 : 81 L. J. Ch. 409 : 106 L. T. 556, *Rakusen v. Ellis, Munday and Clarke*.

"The whole basis of the jurisdiction to grant the injunctions is that there exists—or, I will add, may exist or may be reasonably anticipated to exist—danger of a breach of that which is a duty, an enforceable duty, a duty not to communicate confidential information. But directly you have negatived the existence or possible existence of any such danger, in my opinion the whole basis and substructure of the possibility of injunction is gone."

It is clear from the authorities that change of sides as such is not forbidden by law. Change of sides is forbidden if there are confidential communications by one side which may be made use of when the lawyer represents the opposite party. It is forbidden if the lawyer obtains his own discharge and acts for the opposite party. It is also forbidden if the lawyer accepts a retainer from the opposite party without first offering his services to his original client. In the present case, I hold that there were no confidential communications in possession of Mr. Ram Lal Anand which had not already become public property when he accepted the brief for Bhagwan Dass. Further, Mr. Ram Lal Anand did not obtain his own discharge. The proceedings for the winding up and the Letters Patent appeal had terminated. The two matters in which he had been retained had come to an end. The Official Liquidator had refused to avail himself of the services of Mr. Ram Lal Anand. In these circumstances, I am unable to hold that Mr. Ram Lal Anand was guilty of professional misconduct in accepting the brief of Bhagwan Dass Mehra.

It was contended by Mr. Ram Lal Anand that when he drafted the winding up petition on 27th July 1943, he made allegations of dishonesty against the "management of the Company." It was maintained by him that by the "management of the Company." he meant the Secretary, the Keeper of the godown, the Director in charge and other servants of the Company. It was urged that as Bhagwan Dass Mehra was not one of these persons he had not made any allegations of dishonesty against Bhagwan Dass Mehra. I must say at once that I place no reliance whatever on the statement of Mr. Ram Lal Anand to the effect that when he was drafting the winding up petition he had only the servants of the Company in mind, and that he was not making any allegations of dishonesty against the Directors generally. In this respect, I regret to say that Mr. Ram Lal Anand has not thought fit to make a correct statement before this Court. I am certain that the word "management" was used by Mr. Ram Lal Anand in the winding up petition to include

both the servants and the Directors of the Company. I strongly disapprove of the attitude adopted by Mr. Ram Lal Anand in contending that when he used the words "management of the Company" in the petition, he had only the servants of the Company in mind, and that the Directors were not included. By making an incorrect statement, in order to escape liability, Mr. Ram Lal Anand has lowered himself in my estimation. Though I strongly disapprove of Mr. Ram Lal Anand's method of putting his case before the Court, I must hold that he has not been proved to be guilty of professional misconduct.

Had Mr. Ram Lal Anand called Mr. Joshua as his witness when the hearing of this petition started and had he put himself into the witness-box, this petition could have been disposed of very much earlier. By failing to do so he has wasted a great deal of the time of the Court.

For the reasons given above, I would dismiss this petition of Manak Chand. I would, however, leave the parties to bear their own costs.

Teja Singh J.—I agree.

Bhandari J.—I agree.

V.W./D.H. *Application dismissed.*

[Case No. 59]

A. I. R. (33) 1946 Lahore 305

DIN MOHAMMAD AND MOHAMMAD
SHARIF JJ.

Mukhtar Singh — Defendant —
Appellant
v.

Nathal and another, Plaintiffs and
others, Defendants—Respondents.

Second Appeal No 896 of 1944. Decided on 22nd January 1946, from decree of Dist. Judge, Ludhiana, D/- 18th April 1944.

Custom (Punjab) — Adoption — Jat Grewal of Ludhiana District — Essentials of valid adoption stated — In absence of continuous subsequent treatment as adopted son mere execution and registration of deed of adoption, even coupled with mutation is not sufficient to establish adoption.

An appointment of an heir in order to be valid must be made in some unequivocal and customary manner and the execution of a deed coupled with a long course of treatment has always been recognised as one of the modes of manifesting such an appointment. There must be a clear declaration of an intention to adopt the boy concerned as a son and the execution of a deed of adoption with the continuous subsequent treatment as an adopted son is a sufficient manifestation of that intention. Where this continuous subsequent treatment as an adopted son is lacking, the mere execution and registration of a deed of adoption is not enough.

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In the absence of proof of adoption a deed of adoption is no more than a paper transaction : ('23) 10 A. I. R. 1923 Lah. 497; ('30) 17 A. I. R. 1930 Lah. 464 and ('24) 11 A.I.R. 1924 Lah. 103, *Rel. on* ; ('39) 26 A. I. R. 1939 Lah. 62, *Expl.*

[P 306 C 1, 2]

Where a Jat Grewal of Ludhiana District executed and registered a deed of adoption and also got the property mutated in the name of the boy alleged to have been adopted, but there was no proof of the adoption or any continuous subsequent treatment as an adopted son ; on the contrary, he repudiated the adoption by execution and registration of another deed :

Held that beyond the mutation there was nothing to show that possession had actually passed, and that in the above circumstances no adoption could be held to have been established.

[P 306 C 2]

Inder Dev Dua and Jhanda Singh —

for Appellant.

Mela Ram and C. L. Aggarwal —

for Respondents 1 and 2.

Mohd. Sharif J.—The facts of the case out of which this second appeal has arisen may be shortly stated. One Harnama, a Jat Grewal of Ludhiana District, was the owner of the property in suit. On 1st July 1940 he executed a deed of adoption in favour of the present appellant and it was registered the following day. It recited that Mukhtar Singh, a minor son of Kahan Singh, one of his distant collaterals, had been adopted with all due formalities seven years before and had been treated as a son and would succeed him like his own son, but as no writing was made then it was being made now. On the strength of this deed, the father of the boy made a report to the Patwari on 23rd July 1940 that the property of Harnama be mutated in the name of his son, and after recording the statement of Harnama the mutation was sanctioned on 30th July 1940. On 10th January 1942, however, Harnama executed another deed by which he cancelled his former deed of adoption and repudiated all what had been stated therein. This was also registered. Ten days later, a suit which has led to the present appeal was instituted by the plaintiff-reversioners for a declaration that the deed of 1st July 1940 and the oral gift of 30th July 1940 were invalid as the property conveyed was ancestral *qua* them and no adoption had ever taken place. The trial Court held that no adoption was proved; that there was no proof of treatment as a son either before or after the deed; that Harnama was a man of low intelligence who could easily be prevailed upon by his kindreds; that on a previous occasion on 4th January 1936 a similar deed of adoption had been made in favour of Dalip Singh plaintiff which was similarly

cancelled on 15th April 1936; and that the property in suit was not proved ancestral. On this finding as to the nature of the property the suit was dismissed and the oral gift upheld. The plaintiffs appealed and the learned District Judge agreed with the conclusions of the first Court on all points, but holding the property to be ancestral accepted the appeal and decreed the suit. The defendant has now come up in second appeal.

It is contended that an adoption or an appointment once made could not be revoked and that the execution of the deed followed by gift and the delivery of possession is *per se* sufficient proof of adoption. Reliance is placed on A. I. R. 1939 Lah. 62,¹ a case of the Jat tribe of this district. Here one Manu had appointed Biru, his nephew, as his heir and made a gift of land to him. Afterwards he had revoked the adoption and gift and instituted the suit for a declaration that they were invalid and had been made under undue influence and fraudulently. No undue influence was established. On reference to the answer to question 68 of the Customary law of the district prepared in 1911 it was held that

"no special formalities are considered necessary in cases of adoption and that sometimes a deed of adoption is executed; but a mere declaration of adoption and general treatment as a son are considered sufficient. In the present case there is a deed of adoption which was later followed by a gift of land. This certainly was sufficient compliance with what is required by the Customary law."

On a cursory view, this judgment does lend some colour to the appellant's contention. As it was a second appeal we wanted to be sure of the conclusions of the lower Courts on facts and sent for the record. It was discovered that the findings were entirely in favour of the adopted son. It was held that

"the adoption was the outcome of Manu's own free will which was absolutely unfettered; . . . that after the death of his mother Biru was always maintained by Manu who always lived with the former; that Biru was married by Manu to his brother-in-law's daughter; that after the deed of adoption Manu also effected the gift of land in favour of Biru; that mutation was effected and that the possession of the land gifted was with the donee."

It was on these findings that the second appeal reported in A. I. R. 1939 Lah. 62¹ was dismissed.

It is well established that the appointment in order to be valid must be made in some unequivocal and customary manner, and the execution of a deed coupled with a long course of treatment has always been

1. ('39) 26 A. I. R. 1939 Lah. 62 : 182 I. C. 576, Phuman Singh v. Manu.

recognized as one of the modes of manifesting such an appointment: 77 I. C. 473.² There must be a clear declaration of an intention to adopt the boy concerned as a son and the execution of a deed of adoption with the continuous subsequent treatment as an adopted son is a sufficient manifestation of that intention. Where this continuous subsequent treatment as an adopted son is lacking the mere execution and registration of a deed of adoption is not enough: 130 I. C. 51.³ In the absence of proof of adoption a deed of adoption is no more than a mere paper transaction: 4 Lah. 356.⁴ In the present case beyond the mutation of 30th July 1940 there is nothing else to show that the possession has actually passed to the appellant. The concurrent findings of fact as to the fact of adoption are dead against the appellant. I would, therefore, agree with the learned District Judge and dismiss the appeal, but in view of the peculiar circumstances of this case leave the parties to bear their own costs in this Court.

Din Mohammad J. — I agree that the appeal be dismissed.

D.R./D.H.

Appeal dismissed.

2. ('23) 10 A. I. R. 1923 Lah. 497 : 77 I. C. 473, Baj Singh v. Partab Singh.

3. ('30) 17 A. I. R. 1930 Lah. 464 : 130 I. C. 51, Said Bibi v. Umar Din.

4. ('24) 11 A. I. R. 1924 Lah. 103 : 4 Lah. 356 : 74 I. C. 294, Ishar Singh v. Sarat Singh.

[Case No. 60.]

A. I. R. (33) 1946 Lahore 306

ABDUL RASHID Ag. C. J. AND ACHERU RAM J.

Buta Singh and others—Plaintiffs—
Appellants

v.

Mt. Harnamon and others — Defendants — Respondents.

Second Appeal No. 1488 of 1942, Decided on 18th October 1945, from decree of Dist. Judge, Gurdaspur, D/- 16th July 1942.

(a) Custom — Earlier and later *riwaj-i-ams* — Preference — Presumption.

The initial presumption in favour of the *riwaj-i-am* applies to the latest *riwaj-i-am* in preference to an earlier *riwaj-i-am* unless the latest *riwaj-i-am* is shown to have been imperfectly compiled : L. P. A. No. 80 of 1941, *Rel. on.* [P 307 C 2; P 308 C 1]

(b) Custom (Punjab)—Succession—Rights of daughters—Gurdaspur District—*Riwaj-i-am* of 1893 prevails over that of 1913 — Collaterals of last male holder in fifth degree are not entitled to succeed to his ancestral and self-acquired property in preference to his daughters.

According to the custom in the Gurdaspur District collaterals of the last male holder in the fifth

degree are not entitled to succeed to his ancestral and self-acquired property in preference to his daughters. The *riwaj-i-am* of the Gurdaspur District of 1893 correctly represents the custom of the District that the daughters cannot inherit the property of their father if there are near male kindred of the father. The custom as recorded in the *riwaj-i-am* of Gurdaspur District compiled in 1913 by Mr. Kennaway to the effect that a daughter is excluded from inheritance to the property of her father by collaterals however, remote, cannot be given effect to as it is not only against the general custom of the Punjab as embodied in para. 23 of Rattigan's Digest of customary law to the effect that a daughter only succeeds to the ancestral property of her father in default of near male collaterals of her father but it is also against the custom as recorded in the earlier *riwaj-i-am* of 1893 that the daughters cannot inherit the property of their father if there are near male kindred: ('36) 23 A.I.R. 1936 Lah. 68, *Rel. on.* [P 308 C 1, 2 ; P 309 C 1]

Mukand Lal Puri, Shambu Lal Puri and Daya Kishen Mahajan—for Appellants.

Shamair Chand, Bhagat Singh and P. C. Jain—for Respondents.

Abdul Rashid Ag. C. J.—This appeal has arisen out of an action brought by Buta Singh and others against Mt. Harnamon and others for possession of three houses and a large area of agricultural land left by Dyal Singh deceased. The plaintiffs are the collaterals of the last male holder in the fifth degree while the defendants are his daughters. The principal question for determination is whether the plaintiffs as collaterals of Dyal Singh deceased are entitled to succeed to his ancestral property in preference to the latter's daughters, the defendants. Both the Courts have concurred in dismissing the plaintiffs' suit. The plaintiffs have accordingly preferred a second appeal to this Court. Issue 3 framed by the trial Court was in the following terms:

"Whether the plaintiffs are heirs of Dyal Singh deceased in preference to the latter's own daughters both in respect of self-acquired and ancestral property."

Mr. Shambu Lal Puri urged strenuously that the trial Court had erred in placing the onus of this issue on the plaintiffs. The learned counsel contended that the general custom of the Punjab was in his favour and that the onus ought to have been placed on the daughters to establish whether they were entitled to exclude the fifth degree collaterals of the last male holder in succession to ancestral property. Reliance was placed in this connection on para. 23 of Rattigan's Digest of Customary Law which lays down that a daughter only succeeds to the ancestral property of her father, if an agriculturist, in default of near male collaterals of her father. It was suggested by the learned counsel that collaterals in the fifth degree

must be regarded as near male collaterals and that the daughters must, therefore, establish that they are entitled to succeed to their father's ancestral property in the presence of such collaterals. In my opinion, the general custom of the Punjab is not necessarily in favour of the plaintiffs, in so far as near male collaterals have not been defined in para. 23 of Rattigan's Digest. It has been laid down in several cases that collaterals of the third degree are undoubtedly near male collaterals. Collaterals of the sixth and seventh degrees have, however, not been included in the category of near male collaterals. The case of fifth degree collaterals is on the border line and they may or may not be regarded as included in the category of "near male collaterals." It is unnecessary, however, to labour this point further as I will show later on that the question of onus is merely of academic interest at the present stage and that the point involved in this appeal must be decided on the evidence produced by both parties at the trial. Mr. Puri on behalf of the appellants relies strongly on the answer to question 16 in the Customary Law of the Gurdaspur District compiled in 1913 by Mr. Kennaway. It is stated in this Customary Law that the general rule is that daughters are excluded by the widow and male kindred of the deceased, *however remote*. After giving this reply a number of exceptions have been noted down by the compiler. The answer to question 17 is that no distinction is made as to the rights of the daughter to inherit the immovable or ancestral, and the movable or acquired property of her father. The learned counsel contended that it was incumbent on the lower Courts to follow the latest *riwaj-i-am* in preference to the *riwaj-i-am* compiled at the settlement of 1893 and that they had erred in preferring an earlier *riwaj-i-am* to the latest *riwaj-i-am*. In this connection the learned counsel referred to a large number of decisions laying down that the latest *riwaj-i-am* should be preferred to the earlier *riwaj-i-am* when there is any conflict between the two. The whole position with respect to conflicts in the earlier and the later *riwaj-i-ams* has been discussed in a Division Bench judgment of this Court, to which I was a party, in L. P. A. No. 80 of 1941.¹ It was there laid down that the initial presumption in favour of the *riwaj-i-am* applies to the latest *riwaj-i-am* in

1. L. P. A. No. 80 of 1941, *Sunder Lal Singh v. Dalip Singh*.

preference to an earlier *riwaj-i-am* unless the latest *riwaj-i-am* is shown to have been imperfectly compiled.

The *riwaj-i-am* of 1893 states that if there are near male kindred, daughters and their descendants cannot inherit but are entitled to maintenance until marriage. It further states that there is no distinction as to the rights of daughters to inherit the immovable or ancestral, and the movable or acquired property of their father. A note is appended to the answer to question 16 which is in the following terms:

"The exact limit of relationship up to which near male kindred exclude daughters and their descendants is not fixed. Probably all descendants of a common great-grandfather would, as a daughter's right of inheritance as such is very weak. In 60 P. R. 1889² it was held that amongst Sabzwari Syads no custom was proved by which distant collaterals excluded daughters and this decision is in accordance with the general practice."

A comparison of the two *riwaj-i-ams* shows that in 1893 the general practice was that only the descendants of a common great-grandfather could deprive the daughter of inheritance to the property of her father. In other words, collaterals of the fourth degree could succeed in preference to the daughter. The *riwaj-i-am* of 1913, however, lays down that a daughter is excluded from inheritance to the property of her father by collaterals, however remote. According to the learned counsel, the position of the daughter had greatly deteriorated during the 20 years that elapsed between 1893 and 1913 and the agriculturists of Gurdaspur adopted a new custom whereby a daughter could be deprived of the entire property of her father, whether movable or immovable, by collaterals, however remote. In my opinion this contention cannot be acceded to. The *riwaj-i-am* of 1913 is not only against the general custom of the Punjab as embodied in Para. 23 of Rattigan's Digest of Customary Law but it is also against the custom as recorded at the earlier settlement. Even Mr. Puri was not prepared to go to the extent of contending that the custom of the Gurdaspur District had changed to the detriment of the daughter to this extent that she could be deprived of the property of her father by remote collaterals of the tenth or fifteenth degree. There is, therefore, no warrant whatever for the entry in the *riwaj-i-am* of 1913 to the effect that a daughter can be deprived of the property of her father, both ancestral and self-acquired, by collaterals, however remote.

2. ('89) 60 P. R. 1889, Ramzan Shah v. Sohna.

The two *riwaj-i-ams* of the Gurdaspur District compiled in 1893 and 1913 were exhaustively discussed in a Division Bench judgment of this Court in 17 Lah. 101.³ It was pointed out that in the latter *riwaj-i-am* the entries in the prior *riwaj-i-am* were not referred to and no indication was given as to how the position of the daughter had deteriorated to such an extent during a period of 20 years. If an old custom has changed, the change would have to be gradual and a new custom could not be created by a mere assertion of the various tribes at a subsequent settlement. It might be, as was pointed out in the reported case, that the answer to question 16 in the latter *riwaj-i-am* was made out of self-interest and it went too far. A startling custom of this type cannot be given effect to unless it is established that the latter *riwaj-i-am* contains a correct exposition of the custom as it existed at the time when it was compiled. It is well-known that the position of the daughter improved considerably throughout the Province of the Punjab between the years 1893 and 1913. The startling entry made in the answer to question 16 in Mr. Kennaway's Customary Law of the Gurdaspur District cannot, therefore, be given effect to unless it is shown independently that the custom embodied in the *riwaj-i-am* of 1893 had undergone a radical change.

The oral evidence produced by the parties has been rightly discarded by the trial Court. There are some judicial instances, however, which were produced on behalf of the daughters which are of great importance. Exhibit D-3 is a judgment by the District Judge of Gurdaspur wherein it was held that the collaterals of the fifth degree were not entitled to a decree for the cancellation of a gift made by a sonless proprietor in favour of his daughter. This case related to the Randhawa Jats of Tahsil Batala. The gift was upheld on the ground that even in respect of ancestral property the daughter was a preferential heir to the collaterals of the fifth degree. The learned District Judge came to the conclusion that collaterals up to the fourth degree only could exclude the daughter from succession to ancestral property. Exhibits D-6, 7 and 10 are also judicial instances where it has been held that the collaterals of the fifth, the seventh and the tenth degrees could not exclude the daughters from succession to the ancestral property amongst the Randhawa Jats of

3. ('36) 23 A. I. R. 1936 Lah. 68 : 17 Lah. 101 : 161 I. C. 692, Kesar Singh v. Achhar Singh.

Tehsil Batala. These judgments are valuable as they show unmistakably that the custom, with respect to the rights of daughters, as embodied in Mr. Kennaway's Customary Law of 1913 was not given effect to. These judgments laid down that the *riwaj-i-ams* of 1865 and 1893 contained a correct statement of the custom regarding the rights of daughters in the Gurdaspur District. Mr. Kennaway's *riwaj-i-am* was, therefore, definitely discarded. For the reasons given above, I am of the opinion that it has been established that the defendants are entitled to succeed to the ancestral and self-acquired property of their father in preference to the plaintiffs. I would accordingly affirm the concurrent judgments and decrees of the Courts below and dismiss this appeal. Having regard to all the circumstances, I would leave the parties to bear their own costs throughout.

Achhru Ram J. — I agree.

G.N./D.H.

Appeal dismissed.

[*Case No. 61.*]

A. I. R. (33) 1946 Lahore 309

TEJA SINGH AND MOHAMMAD
SHARIF JJ.

Mangal Singh Partap Singh
Convict — Appellant

v.

Emperor.

Cr. Appeal No. 732 of 1945, Decided on 14th December 1945, from order of Sessions Judge, Montgomery at Lahore, D/- 20th July 1945.

Penal Code (1860), S. 149 — Offenders more than five—Some not identified — Section still applies.

Where the number of offenders is at least six or seven the fact that three or four of them could not be identified does not prevent the application of S. 149 : ('39) 26 A. I. R. 1939 Lah. 416, *Disting.*
[P 315 C 2 ; P 316 C 1]

Penal Code —

('45) Ratanlal, P. 345, N. "Scope."

('36) Gour, P. 516, Para. 1408.

J. G. Sethi, D. D. Khullar and Nazir Ahmad — for Appellant.

A. R. Khosla, Assistant Legal Remembrancer and S. Gurdev Singh for Advocate-General—for the Crown.

Teja Singh J.—The appellants, who are three in number, have been convicted by the Sessions Judge, Montgomery, under ss. 148, 302/149 and 307/149, Penal Code, and have been awarded two and seven years' rigorous imprisonment each under the first and the third count respectively and the sentence of death each under the second count. They have preferred separate appeals.

There is also before us a reference by the Judge of the Court below for the confirmation of the three sentences of death. The occurrence took place on 30th September 1944. The principal persons who took part in it are the descendants of Jaimal Singh, a Sikh Jat of the village which after him is called Killi Jaimal Singh. Jaimal Singh left five sons, namely, Amir Singh, Wazir Singh, Budh Singh, Hira Singh and Sawan Singh. Amir Singh's son is Balwant Singh, who is the *lambardar* of the village. Budh Singh died issueless. His widow, Mt. Kaki, is still alive. Hira Singh and Sawan Singh had four and five sons respectively. Wazir Singh had also no issue and it was alleged by Gajjan Singh, son of Sawan Singh, that he adopted him as his son. On 20th October 1934 Wazir Singh made a will leaving his entire property to Gajjan Singh. On 27th November 1940 Amir Singh along with Hazara Singh, Dhara Singh, Changhara Singh and Fauja Singh, sons of Hira Singh, and Mt. Kaki, widow of Budh Singh sued Gajjan Singh and other sons of Sawan Singh for joint possession of their share in the land left by Wazir Singh, alleging that Wazir Singh having died childless, they were entitled to succeed to him along with Sawan Singh's sons. They further alleged that Gajjan Singh's contention that he had been adopted by Wazir Singh and accordingly he alone could inherit the whole of the property left by him was unfounded. The suit was dismissed by the trial Sub-Judge on 23rd July 1942. On appeal the District Judge set aside the judgment and the decree of the trial Judge and decreed the plaintiffs' suit. From the appellate decree of the District Judge, Gajjan Singh and his brothers preferred a further appeal to this Court. This was dismissed *in limine* on 7th July 1943. Gajjan Singh and his brothers made an application for review and at the same time applied for leave to appeal to the Privy Council. Both these applications were dismissed on 15th May 1944. The plaintiffs then took out execution of their decree and symbolical possession of the land was awarded to them on 9th June 1944 through Field Qanungo Mohammad Iqbal. The actual possession of the land, however, remained with Gajjan Singh and his brothers and it is admitted that they sold the *munji* crop, which they started harvesting some days before the present occurrence. It was natural that the relations between the sons of Sawan Singh on the one side and the remaining descendants of Jai-

mal Singh on the other should be strained because of the litigation and the latter's desire to deprive their opponents of what they considered was legitimately due to them. Each side apprehended breach of the peace at the hands of the other and the police had to start proceedings under ss. 107 and 151, Criminal P. C., against a number of persons belonging to both sides. These proceedings had not yet terminated when the occurrence took place.

On 30th September 1944 about 2 P. M., Dhara Singh accompanied by some other persons went to Gajjan Singh's threshing floor where the harvested *munji* had been stacked. Three of his party were fired at and killed by Gajjan Singh's party and some were injured. Dhara Singh went to the police station, Renala Khurd, about 11 miles distant from his village and lodged the first information report at 6 P. M. The report was taken down by A. S. I. Abdur Rashid and A. S. I. Miraj-ul-Hassan left for the spot for investigation. Just as Miraj-ul-Hassan was about to leave the police station he got a telegram from the Station Master, Railway Station Wan Radha Ram, informing him that one man had been murdered and another had been seriously injured at Chak No. 2/1 A. L. The distance between the Chak and Killi Jaimal Singh is about two miles. The A.S.I. reached Killi Jaimal Singh about 10 in the night and took up the investigation. His evidence is that while preparing the inquest report of the three men who had been shot dead at Gajjan Singh's *pir* he recorded the statement of Gurbakhsh Singh, who was an eye-witness to the incident to which the telegram related. Thinking that both the incidents were connected and were parts of the same transaction he did not consider it necessary to draw up a fresh first information report. It was on 8th October that sayed Murtaza Hussain, Inspector, ordered the registration of another case. Two cases were put in Court by the police (i) against six persons namely, Gajjan Singh, Mangal Singh, Walia, Haku, Surjan Singh and Arjan Singh for rioting, for causing the murders of Bashir, Miraj and Thiraj and for inflicting injuries upon Sadhu, Dulla and Bakhsha in the prosecution of the common object of the assembly at Gajjan Singh's threshing floor and (ii) against eight persons namely, Gajjan Singh, Sharam Singh, Surjan Singh, Teja Singh, Jagjit Singh, Walia, Buta and Mangal Singh for rioting and for killing Sher Singh and causing grievous hurt to Jalmer Singh. Both the cases were tried by

the same Sessions Judge. In the first case he acquitted four persons and convicted Gajjan Singh and Mangal Singh under S. 304-I, Penal Code, and sentenced them to transportation for life each. He also convicted them under S. 307, Penal Code, and sentenced each of them to five years' rigorous imprisonment and ordered both the sentences to run concurrently. The second case ended in the acquittal of five and the conviction of Gajjan Singh, Surjan Singh and Mangal Singh under ss. 148, 302 and 307 read with S. 149, Penal Code. These appeals arise out of the second case. Of the accused who are common to both the cases Gajjan Singh and Surjan Singh are real brothers being the sons of Sawan Singh. Mangal Singh is a relation of theirs and belongs to the district of Gujranwala. According to some of the witnesses he also resided in a village in Lahore district. Walia is alleged to have taken some land on lease from Gajjan Singh and his brothers. Arjan Singh and Teja Singh are the brothers of Gajjan Singh and Surjan Singh. Sharam Singh is the son of Gajjan Singh while Jagjit Singh is the son of Teja Singh, the fifth brother of Gajjan Singh and others. Haku and Buta are alleged to be the tenants of Gajjan Singh and his brothers.

In order to be able to appreciate the position taken up by the prosecution and the defence in the present case, it is necessary to refer briefly to what they alleged in the first case. The prosecution maintains that when the complainant party came to know that Gajjan Singh and his brothers had harvested the *munji* crop and were about to take it away Dhara Singh collected some of his men and went to the threshing floor where the *munji* had been stacked with a view to request Gajjan Singh not to remove it until the return of Balwant Singh from Montgomery where he had gone to attend a case. Though Dhara Singh carried a small *kirpan* and one or two of his companions carried sticks, they maintained that they went on a peaceful mission and their object was merely to entreat Gajjan Singh and his companions to accede to their wishes and to have the matter settled amicably. Gajjan Singh adopted a different attitude and it appeared that he had not only armed himself with a gun in order to attack the complainant party and kill someone of them, but had also gathered together his relations and friends, two of them also had guns with them. As soon as the complainant party approached the *pir* all the three gunmen fired at them and shot dead Bashir and Miraj on the spot.

The others took to heels and were fired at while they were running. Of the persons who were hit then, Thiraj fell down at some distance from the *pir* and died. Dhara Singh managed to escape and went straight to the police station. Gajjan Singh's defence was that Dhara Singh's party which consisted of about thirty men armed with lethal weapons such as spears, revolvers, etc., came to his threshing floor in order to remove the *munji* crop by force and attacked him and his companions. Accordingly he fired upon them in self-defence and killed three men and injured others. The remaining accused pleaded *alibi* and stated that they had been involved because they were either related to Gajjan Singh or were interested in him.

The prosecution version in the present case is as follows. Balwant Singh and his sons Sher Singh and Jalmer Singh left their village on the morning of the day of occurrence for railway station Wan Radha Ram. From there Balwant Singh took a train for Montgomery while his sons proceeded to a village called Sheikham at a distance of few miles from Pattoki railway station. The sons were to return to the village and did in fact return by a train that reached Wan Radha Ram shortly after 2 P. M. Some witnesses described the train as the evening train but it appears to me that they meant the train mentioned above, because the other train did not reach Wan Radha Ram till eight or some time after 8 P. M., and since Killi Jaimal Singh is about five miles distant from the railway station, Sher Singh and Jalmer Singh could not have thought of coming back by it. That they were due to arrive by that train somehow or other became known to Gajjan Singh and his party and after they had killed and wounded a number of the members of the other party, 11 or 12 of them proceeded to the railway station with the object of intercepting them on the way and killing both or one of them. Gajjan Singh and his son Sharam Singh were both riding a horse. Surjan Singh and Mangal Singh rode another horse. Jagjit Singh *alias* Jita was cycling and Walia was sitting behind him on the carrier. The remaining persons followed them on foot. Of these the witnesses were able to identify only Teja Singh and Buta. Surjan Singh was armed with a gun, Gajjan Singh and Buta with spears. Of the rest some had *kirpans* and while others were empty-handed. Gurbakhsh Singh of Sheikham, who is the sister's son of Sher Singh and Jalmer Singh's mother accompanied them. The

train by which they travelled reached Wan Radha Ram about 2-15 P. M. and from there they engaged a tonga driven by P. A. Bihari Lal. When they got near the bridge of Khokhar Canal Rest House, which is known as Kothi Khokar, Bihari Lal wanted to water his mare and asked the passengers in his tonga to get down. In the meanwhile Qambar, who is employed as a gardener by Balwant Singh, came up galloping a horse, informed Sher Singh and Jalmer Singh of what had happened in the village, warned them that Gajjan Singh and his party were out to attack or kill them and advised them to save themselves by running away. Realising the danger that faced them Sher Singh and his companions decided to turn back to Wan Radha Ram. Gurbakhsh Singh, who had injured one of his legs and could not walk easily, was given Qambar's mare and the rest of them walked by his side. On the way they halted at the Canal Rest House in order to persuade the clerk to send a telegram to the police station but the latter did not accede to their wishes. They had hardly gone about half a mile further on when they were overtaken by the accused party. Gajjan Singh shouted to his companions to catch hold of and kill them on the spot. As was natural each one of them ran for his life. Gajjan Singh, Mangal Singh, Sharam Singh and Jita pursued Jalmer Singh. Teja Singh, Surjan Singh and Buta ran after Gurbakhsh Singh and Qambar was chased by Walia and others. Sher Singh was fired at by Surjan Singh and was attacked with *kirpans*, etc., by his other pursuers. He fell down dead. Jalmer Singh also received some injuries at the hands of those who ran after him and dropped down wounded. Gurbakhsh Singh escaped unhurt and took shelter at the *dera* of Kanwar Devi Chand, which is about half a mile from the scene of occurrence. Qambar also arrived there shortly afterwards. They both related the whole story to Kanwar Devi Chand who took a number of his men with him and accompanied by Gurbakhsh Singh and Qambar went to the spot. They found Jalmer Singh lying unconscious. Two or three men were asked to keep guard over Sher Singh's dead body while Jalmer Singh was taken to Kanwar Devi Chand's *dera*. Gurbakhsh Singh then went to Killi Jaimal Singh, which is about a mile and a half from the *dera*. It was after some time that the A. S. I. and Balwant Singh arrived. We are told by the A. S. I. that first of all

he prepared the statement of injuries of the three men who were killed at or near Gajjan Singh's threshing floor and then prepared the inquest reports relating to them. Gurbakhsh Singh's statement was incorporated in the inquest report of Bashir during the night. The A. S. I. did not go to Kanwar Devi Chand's *dera* till next morning about 10 A. M. It may here be mentioned that Kanwar Devi Chand's *dera* is within the area of Chak 2/1AL and the telegram that the A. S. I. had received before leaving the police station was despatched at the instance of Bir Singh, whom Kanwar Devi Chand had sent to the railway station for this very purpose. This telegram is Ex. P. W. 21/1 and was given at the earliest opportunity. According to the medical evidence Jalmer Singh received 14 injuries, which, with the exception of one which was described as faint bluish contusion, 3" x 1" just below the left nipple, were all incised wounds. Four of them were pronounced to be grievous. Sher Singh had 18 injuries in all, one of which was a gunshot wound on the right buttock 3½" x 3" fracturing the iliac bone into several pieces. On the edges of this wound were present several other gunshot wounds measuring about ¼" in diameter. The doctor, who performed the *post mortem* examination, removed 19 pellets from this wound. The remaining injuries included a lacerated punctured wound on the back of the head 2" x 2" and deep to the brain, out of which brain was protruding, and fracturing the occipital bone, a fracture of the lower jaw both on the left and the right side and an incised wound also on the top of the head.

All the accused denied their guilt and, with the exception of Gajjan Singh, also pleaded *alibi*. Gajjan Singh admitted that he was present at the time Sher Singh and Jalmer Singh were injured but denied having participated in the assault upon them. His statement was that after the first incident he and four or five "helpers" of his were proceeding to Wan Radha Ram to send a telegram, presumably to the police, informing them of the assault made upon him by the other side and the attempted dacoity. On the way they met Jalmer Singh and Sher Singh who attacked them. Jalmer Singh carried a *kirpan* while Sher Singh was armed with a country made pistol. His companions injured them in order to repel their attack. He admitted that he had a gun but did not admit having used it. The chief witnesses upon whose

testimony depends the fate of the case are Gurbakhsh Singh, Jalmer Singh, Qambar, Ahmi and Nizam. Bihari Lal, tonga driver, corroborated the statements of Gurbakhsh Singh and Jalmer Singh that they travelled by his tonga from the railway station to the bridge where they were met by Qambar. Kanwar Devi Chand described how Gurbakhsh Singh and Qambar came to his *dera* and after he had been apprised of the incident he accompanied them to the spot and from there had Jalmer Singh carried to his place. He also deposed that he deputed Bir Singh to send the telegram. The learned Sessions Judge discarded the testimony of Bihari Lal. As regards the rest of the witnesses he held that they were true witnesses and those who claimed to have been present at the time the incident happened were actually present on that occasion. Because of certain discrepancies in the evidence and because some witnesses had omitted to make mention of the accused whom he acquitted, in some of their statements, he held that their participation in the offence was not proved beyond doubt. He was, however, convinced that Gajjan Singh, Mangal Singh and Surjan Singh took part in the offence along with three or four other persons, whose identity could not be established.

The line of argument adopted by the appellants' counsel before us was that nobody excepting Jalmer Singh had witnessed the incident, that Jalmer Singh being an interested person his evidence was not true and there being bitter enmity between the parties, he tried to rope in every able bodied member of the families of Gajjan Singh and his brothers, that there was very long delay in drawing up the first information report, the reason being that the police and the complainant party wanted considerable time to concoct a plausible story and to secure witnesses who should be willing to support it and that Gurbakhsh Singh was specially sent for from his village to give evidence. Counsel also argued that the story that Sher Singh and Jalmer Singh had gone to Sheikham and returned therefrom by train is made up. In my judgment there is no force whatsoever in these contentions. It cannot be denied that there was a train coming from the side of Pattoki and it reached Wan Radha Ram shortly after 2 P. M. It is also not denied that the occurrence took place on the road from the railway station to Killi Jaimal Singh and at some distance from Khokhar Canal Rest House. I do not think these were mere coincidents. The ex.

planation given by Gajjan Singh that he and his friends were then proceeding to the railway station to give a telegram cannot be true. Apart from the fact that no evidence was adduced to prove the defence version it is significant that Gajjan Singh did not even consider it proper to disclose the names of his companions. It was alleged that he and his companions were attacked by Jalmer Singh and Sher Singh one of whom was armed with a country-made pistol, but there is no evidence that they received any injuries. No doubt Gajjan Singh was later on medically examined and was found to have two slight injuries on his person, but he admitted that he had received these at the hands of his opponents during the first incident. Had any of his companions received injuries it is reasonable to think that they would have been produced before the police and would have been medically examined. It is further significant that no telegram was sent either by Gajjan Singh or by the men who accompanied him. It was alleged that this became impossible in view of what had happened but I cannot understand why it should be so. If Gajjan Singh and his friends could have the presence of mind and take the courage of proceeding to the railway station to give a telegram after having killed three men and injured a few others the fact that they killed another on the way should not have made any difference, particularly when their position is that the causes which precipitated both the incidents were identical.

Behari Lal's evidence is very clear that Gurbakhsh Singh alighted from the train at the railway station at Wan Radha Ram with Sher Singh and Jalmer Singh and he travelled with them to the bridge. It is not shown that he had any motive to give false evidence against the appellants. In his cross-examination two suggestions were made, one by Rai Bahadur Jowala Parshad who appeared for Gajjan Singh, Sharam Singh, Teja Singh and Jagjit Singh that he had been bribed by Balwant Singh and the second by Mr. Khuller, who defended Mangal Singh and Surjan Singh accused that he had been beaten by Gajjan Singh appellant because of a dispute between one Siraj and his brother Sundar Das. On the suggestion being put to the witness he denied that there was any truth in them. He admitted that he was given a shoe-beating by Amir, nephew of Siraj, and he reported the incident to the police, but he denied that Gajjan Singh had any concern in that affair.

In view of the fact that the different accused for whom Rai Bahadur Jowala Parshad and Mr. Khuller appeared were members of the same family it is surprising that their instructions with regard to the alleged enmity between the accused and the witness should differ. In my opinion the real reason for this appears to be that the accused had absolutely nothing to urge against the witness and they were merely catching at straws to shake his credit by making baseless allegations. The reasons given by the learned Sessions Judge for not placing reliance upon this witness may be given in his own words:

"Behari Lal is a tonga driver. . . . He deposed that he was taking his passengers and had gone to a distance of 5/6 *killas* from the bridge when he saw Gajjan Singh. . . . They enquired from him if he knew anything about Balwant Singh and his sons and he replied that he knew nothing. He also mentioned various weapons which the culprits had with them. In the police statement, he did not state as to his being asked as to the whereabouts of Balwant Singh and his sons nor did he mention the weapons which the accused had. This is an improvement on the police statement. I, therefore, hesitate to rely upon the evidence of this witness."

It is correct that the witness did not admit having made any omissions in his statement before the police and he was not right in this, but the possible explanation may be that the police did not question him about the points which were elicited from him in his examination in Court. In any case, the omission is not of the nature which could justify us in disbelieving him altogether, more so, when he was entirely a disinterested person.

More important than this witness is Kanwar Devi Chand near whose Chak the occurrence took place. This gentleman belongs to a respectable family and the appellants had nothing to say against his impartiality or reliability. He is a *lambardar* but it seems to me that this position was given to him because he was the most outstanding landowner in his Chak and not because he was a henchman of the police. He stated that he had a licence for four guns and one revolver. A few days ago the police reported that his licence should be cancelled and the reason for this was that he refused to lend his horses to them. On one occasion when he was absent from his house the police took away two of his guns, but they had to return them to him two or three months later. He also stated that he had never given evidence for the police in any other case. It is clear from all these facts that the witness was not at the beck and call of the police like an ordinary *lambardar* and his evi-

dence was entitled to greatest consideration. The point stressed the most by the appellants' counsel against him was that he sent a vague and non-committal sort of telegram to the police about the incident in which neither the names of the culprits nor the names of the murdered and injured men were mentioned and it was urged that this was done either because the witness wanted to leave a scope for the police or the complainant party to develop the story later on or because all that was known to the witness at that time was that a man had been killed and another man had been injured and he was unaware of the identity of the victims of the crime and of the offenders. Now the telegram was given by the station-master and at Government expense, because the description of it given at the top is "N. W. R., licensed telegraphs." Unfortunately the station-master was not put in the witness-box and I have it from Mr. Khuller that no suggestion was made to the learned Sessions Judge to examine him as a court-witness. Even Bir Singh was not put in the witness-box. All we are left with is the evidence of Kanwar Devi Chand and he tells us that he supplied Bir Singh with all the particulars and asked him to give them all in the telegram. He also deposed that on his return from the railway station Bir Singh told him that he had forgotten the names of the culprits etc., and could not get them mentioned in the telegram. There is no material on record from which it can be said that the explanation is false. Besides this I am inclined to think that it was probably the station master who was responsible for the laconic nature of the telegram. He had no interest in the case and he was not concerned with the details. He must have felt that his duty merely was to inform the police that a murder had taken place in a particular village, so that they might go and start the investigation.

Now as regards the delay. There can be no doubt that the first information report was not drawn up with promptitude. In fact even the statements of Gurbakhsh Singh and other witnesses, including Kanwar Devi Chand were not promptly recorded, but I am satisfied that the responsibility for this must lie on the shoulders of A. S. I. Miraj-ul-Hassan and not on those of Gurbakhsh Singh or Kanwar Devi Chand. The A. S. I. tried to wriggle out of the ugly situation that he had created for himself either because he had made the fundamental mistake of treating both the incidents as

part of the same transaction or because he was somewhat lazy, by giving false explanations. He started by saying that he did not come to know of Sher Singh's murder till early hours of the morning of 1st October when he recorded Gurbakhsh Singh's statement. Surely this cannot be true, because he reached Killi Jaimal Singh at 10 in the night and it was admitted that Gurbakhsh Singh was already there. It is in Gurbakhsh Singh's evidence that he informed Balwant Singh of the whole story and it is very unlikely that Gurbakhsh Singh did not pass on the information to the A. S. I. But mention of the murder was made in the telegram which the A. S. I. received before he left the police station for Killi Jaimal Singh. This is what he said when he was questioned about the telegram:

"At the time when I was about to leave police station Rejala Khurd for Killi Jaimal Singh in connection with the three murders involved in the other case, a railway servant came towards the police station and handed over a telegram to me. I cannot understand English nor can I read it. Of course if two persons are talking in English I can follow a little bit. I got that telegram read out to me. The subject-matter of the telegram was one person killed and another person injured. I thought that one of the injured persons of Killi Jaimal Singh murder case might have died, and so I did not then take any action on the telegram, but simply made a note of it in the zimni."

Later on he said:

"I started investigation of that case. During the investigation of that case Gurbakhsh Singh told me in Killi Jaimal Singh regarding the occurrence of the present case. The statement of Gurbakhsh Singh had nothing to do with Killi Jaimal Singh murder case."

He stated that he went on with the investigation of Killi Jaimal Singh's case till the morning of 1st October and did not reach Devi Chand's Chak till 10 A. M. He was cross-examined at considerable length as to why he did not do anything in the present case also and his explanation was that he was busy in the preparation of the injury statements and inquest reports so it did not strike him that the telegram received by him related to some other murder. When cornered he had to admit that Gurbakhsh Singh on his arrival at Killi Jaimal Singh told him that Sher Singh had been murdered and Jalmer Singh was lying injured at Chak No. 2/1 A.L. He also admitted that he was accompanied by an A. S. I. but he did not consider it necessary either to go himself to Chak No. 2 or to send the A. S. I. to take up the investigation of the case or to record the dying declaration of the injured person. He explained that the A. S. I. was a probationer and he did not consider it "worth-

while to entrust this important work to him"; so he merely sent a constable to go to guard Sher Singh's dead body. He further stated that he did not even allow Balwant Singh father of Sher Singh to proceed to Chak No. 2 because he wanted him for the investigation of the Killi Jaimal Singh case. Then he added that it was a dark night and both he and Balwant Singh thought that if the latter was allowed to proceed to the Chak he might be murdered on the way. The perusal of the statement of the witness makes me think that he shifted his ground from time to time and he was not very straightforward and truthful. With all this I do not believe that this can affect the prosecution case in any way, because in view of the evidence of Bihari Lal and Kanwar Devi Chand there cannot be the slightest doubt that Gurbakhsh Singh accompanied Sher Singh and Jalmer Singh from the railway station to the spot and it was from him that Kanwar Devi Chand got the news of the incident first. I may add at this stage that Gurbakhsh Singh was also related to the accused party.

It is not necessary to discuss at length the evidence of Qambar, Ahmi and Nizam. Qambar was of course Balwant Singh's servant, but supported as his evidence is by Gurbakhsh Singh and Behari Lal it cannot be ignored for this reason alone. Ahmi stated that he was grazing his cattle in his square when he heard the outcry and then saw Sher Singh and Jalmer Singh running and being followed by other persons. Nizam Din heard the noise at his *dhari* where he was sitting by the side of his ailing father. It is not denied that the lands of both these witnesses are quite close to the scene of occurrence. Their presence, therefore, is very natural and they are the most likely witnesses and the defence were not able to make out that they had any motive to perjure themselves. It was urged that their names were not mentioned in the police statements of some of the other witnesses but I attach no importance to this omission.

It was also argued before us that the prosecution cast their net very wide, and, as is usual in cases of this kind, roped in every able-bodied person of the family of the accused. Particular stress was laid by the appellants' counsel on the fact that two of the accused, namely, Sharam Singh and Jagjit Singh, sons of Gajjan Singh and Tegh Singh respectively, were very young and it was urged that it was impossible to think that they should have been asked to join in the commission of the offence. Sharam

Singh in his statement before the Committing Magistrate gave his age as 12 or 13 years and Jagjit Singh as 15 or 16 years, but after having seen them in Court my opinion is that they understated their ages. They were fairly tall and well-built and there is nothing surprising in their joining an expedition, which in view of the result of the previous incident every one of them must have regarded as a child's play and involving no risk whatever. It is significant that both these men were among the persons mentioned by Gurbakhsh Singh to Kanwar Devi Chand when he met him immediately after the occurrence and when there was hardly any time for him to manufacture a false story. I cannot, therefore, believe that merely because of the implication of Sharam Singh and Jagjit Singh the prosecution version should be dubbed as false or highly exaggerated. The other fact which it is necessary to mention in this connection is that all the witnesses are agreed that three or four persons of the accused's party could not be identified. It is an admitted fact that there are other members of the families of Gajjan Singh and his brothers, who are not accused in this case. If the complainant party so wanted they could have easily named them but they did not do anything of the kind and the witnesses stated that they could not identify the culprits other than the accused. In any case, the learned Sessions Judge has sifted matter very thoroughly and, after giving the benefit of doubt to everybody who had the slightest claim to it, has convicted only the appellants about whom the case stands affirmatively proved.

Arguments were also addressed to us about the applicability of S. 149, Penal Code, and it was urged on behalf of the appellants that since the lower Court has come to the conclusion that the identity of three or four other persons who, according to it, participated in the crime along with the appellants has not been established, there was no unlawful assembly and each person proved to be offender is liable for his individual act. Counsel relied upon A. I. R. 1939 Lah. 416¹ but in that case it was doubtful whether the number of the persons who had committed the offence was five or more than five. In the present case, the Sessions Judge is quite clear and I entirely agree with him on this point, that the number of offenders was at least six or seven and the fact that three or

1. (39) 26 A.I.R. 1939 Lah. 416 : 184 I. C. 208, Mustqim Jagga v. Emperor.

four of them could not be identified cannot prevent us from applying S. 149. There is abundant evidence that the appellants not only were the members of the unlawful assembly but were also armed with lethal weapons and since Sher Singh was murdered and Jalmer Singh was injured in prosecution of the common object of the assembly I hold that they were rightly convicted.

A word now about the sentence. Gajjan Singh appellant was the ring leader of the party and it goes without saying that it was he who organised the attack. The gun used by Surjan Singh must also be his and the witnesses state that he excited his companions to kill their opponents on the spot. He is, therefore, not entitled to any indulgence. Surjan Singh is, no doubt, younger than Gajjan Singh, but the evidence is that it was he who fired at Sher Singh and killed him. There are absolutely no extenuating circumstances in his case either and I consider that like his brother he too well deserves the extreme penalty of law. Different, however, is the case with Mangal Singh. It is not even urged that he went to the village of the accused knowing that they were bent upon committing any crime. He was related to Gajjan Singh and Surjan Singh and it seems that he came to join them in the commission of the offence because he happened to be there. My opinion, therefore, is that he should be leniently treated.

In the result, I would dismiss the appeals of Gajjan Singh and Surjan Singh and confirm their sentences of death. I would accept Mangal Singh's appeal to the extent that I would commute his sentence under S. 302/149, Penal Code, to transportation for life. I uphold his sentences on the other two counts and order that all these sentences shall run concurrently. His death sentence is not confirmed.

Mahommad Sharif J. — I agree.

N.S./D.H. *Order accordingly.*

[Case No. 62.]

**** A. I. R. (33) 1946 Lahore 316**
FULL BENCH

ABDUL RASHID, AG. C. J., RAM LALL AND
MAHAJAN JJ.

*Works Manager, Carriage and Wagon
Shops, Mohalpurā—Petitioner.*

v.

K. G. Hashmat—Respondent.

Civil Revn. Case No. 359 of 1943, Decided on 5th November 1945, from order of Harries C. J. and Mahajan J., D/- 16th July 1945.

**** Civil P. C. (1908) S. 115** — 'Authority appointed under S. 15 of Payment of Wages Act (1936) is Civil Court and is subject to revisional jurisdiction of High Court under S. 115, Civil P. C., and S. 44 of Punjab Courts Act.

One of the fundamental tests whether a certain Tribunal is a Court or is not so is whether it exercises jurisdiction by reason of the sanction of the law or whether jurisdiction is given to it by the voluntary submission of the parties to a dispute. Another important test whether a certain Tribunal is or is not a Court is whether it can take cognisance of a lis and whether in exercising its functions it proceeds in a judicial manner. [P 318 C 1, 2]

The provisions of the Payment of Wages Act, 1936, and the Rules make it perfectly obvious that the 'Authority' appointed under S. 15 of Payment of Wages Act (1936) performs the delegated judicial functions of the State and in exercising its functions it proceeds in a judicial manner. The fact that the amounts awarded by the 'Authority' are described as directions rather than decrees and that the 'Authority' as such cannot execute its own decrees cannot be regarded as determining factors. Hence the 'Authority' appointed under S. 15 of the Payment of Wages Act (1936) must be regarded as a Civil Court and it is a Court subordinate to the High Court within the purview of S. 115, Civil P. C., and S. 44 of the Punjab Courts Act: ('41) 28 A. I. R. 1941 Pat. 65 (F. B.) and ('45) 32 A. I. R. 1945, Nag. 94, *Rel. on*; ('45) 32 A. I. R. 1945 Lah. 313 (F.B.). *Disting.*; ('44) 31 A. I. R. 1944 Nag. 288, *Dissent*. [P 318 C 2; P 319 C 1; P 320 C 2]

Basant Krishan, Asst. Advocate General—

for Petitioner.

Dina Nath Bhasin — for Respondent.

Opinion of the Full Bench

Abdul Rashid Ag. C. J. — The questions for determination by the Full Bench are : (1) Whether the "Authority" appointed by the Provincial Government under S. 15, Payment of Wages Act (4 [IV] of 1936) is a Civil Court, and (2) Whether the said "Authority" is subject to revisional jurisdiction of the High Court under S. 115 Civil P. C.? The facts of the case are few and simple. One K. G. Hashmat was employed as a Senior Chargeman in the Carriage and Wagon Workshops, North Western Railway. He was receiving a salary of Rs. 160 p. m. in July 1942, as officiating Chargeman at Mohalpurā. On 30th July 1942, he was reverted to the post of Assistant Chargeman as it was stated that he had over-stayed his leave. From 31st July 1942, till 30th September 1942, K. G. Hashmat was in receipt of a pay of Rs. 100 p. m. only. He presented a petition under S. 15, Payment of Wages Act, on 6th October 1942, claiming refund of a sum of Rs. 121-14-6 alleged to have been illegally deducted from his wages by the N. W. R. administration. The petitioner also claimed compensation amounting to ten times the amount deducted by the employer. The claim of the petitioner was heard by S. Gurdial

Singh, who is a Commissioner under the Workmen's Compensation Act and an "Authority" under the Payment of Wages Act, 1936. By this order dated 24th February 1943, the "Authority" directed the N. W. R. to refund the sum of Rs. 121-14-6 as wages, which he held to have been illegally deducted, and Rs. 122, by way of compensation. Costs were also awarded against the N. W. R. administration. The employer presented a petition for revision to this Court under S. 44, Punjab Courts Act. and S. 115, Civil P. C. A preliminary objection was taken on behalf of K. G. Hashmat that no revision was competent because the order in question had not been made by a Civil Court and because the decision of the "Authority" making the order was not subject to the revisional jurisdiction of the High Court.

[2] Before answering the questions referred to the Full Bench it is necessary to examine the relevant provisions of the Payment of Wages Act. It is enacted by S. 15 (1) of the Act that the Provincial Government may, by notification in the Official Gazette, appoint any Commissioner for Workmen's Compensation or other officer with experience as a Judge of a Civil Court or as a stipendiary Magistrate to be the "Authority" to hear and decide all claims arising out of deductions from the wages of persons employed in a certain area. Sub-s. (3) of S. 15 enacts that when any application has been made by any person that an illegal deduction has been made by the employer from his wages the "Authority" shall hear the applicant and the employer and after such enquiry (if any) as may be necessary, may, without prejudice to any other penalty to which such employer or other person is liable direct the refund to the employed person of the amount deducted, together with the payment of such compensation as the "Authority" may think fit. Sub-s. (4) of S. 15 lays down that if the "Authority" hearing an application is satisfied that the application was malicious or vexatious, the "Authority" may direct that a penalty, not exceeding Rs. 50, be paid to the employer. Sub-s. (5) of S. 15 is to the effect that any amount directed to be paid under S. 15 may be recovered: (a) If the "Authority" is a Magistrate, by the "Authority" as if it were a fine imposed by him as a Magistrate, and (b) If the "Authority" is not a Magistrate, by any Magistrate to whom the "Authority" makes application in this behalf as if it were a fine imposed by such Magistrate. By S. 17 the

employer has been given a right of appeal if the total sum directed to be paid by way of wages and compensation by him exceeds Rs. 300. The employee, however, has been given a right of appeal to the District Court if the total amount of wages claimed to have been withheld from him exceeds Rs. 50.

[3] It has been provided by sub-s. (2) of S. 17 that save as provided above any direction made by the "Authority" shall be final. Section 18 lays down that every "Authority" shall have all the powers of a Civil Court under the Code of Civil Procedure for the purposes of taking evidence and of enforcing attendance of witnesses and compelling the production of documents and every such "Authority" shall be deemed to be a Civil Court for all purposes of S. 195 and of Ch. XXXV of the Criminal P. C. Section 22 of the Act enacts that no Court shall entertain any suit for the recovery of wages or of any deduction from wages in so far as the sum so claimed forms the subject of application under S. 15 of the Act. The Provincial Government has been given powers of making rules to regulate the procedure to be followed by the "Authority" under S. 15 of the Act. A reference to these Rules shows that the procedure which is to be adopted by the "Authority" is very similar to the procedure which must be adopted by a Court of justice under the Code of Civil Procedure. The "Authority" can dismiss an application for the applicant's failure to appear on a specified date. If the employer does not appear, the "Authority" can decide the application *ex parte*. A record of the proceedings is to be kept by the "Authority" and in cases where an appeal lies the "Authority" has to record the substance of the evidence produced by the parties. In exercising the power vested in the "Authority" by S. 18 of the Act the "Authority" is enjoined, in respect of the procedure, to abide by the relevant orders of the First Schedule of the Code of Civil Procedure with such alterations as the "Authority" may consider necessary not affecting their substance. To the Rules are appended forms of applications and forms for other proceedings. Each form opens with the words "in the Court of the Authority appointed under the Payment of Wages Act, 1936." The forms show that the "Authority" must give a brief statement of the reason for its finding before any amount can be awarded as delayed wages or as deductions from wages. A comparison of the provisions of the Pay-

ment of Wages Act with the provisions of the Workmen's Compensation Act, 1923, makes it clear that the provisions of the two Acts are almost identical in character.

[4] It was contended on behalf of the respondent that the "Authority" is not a Civil Court as it was open to the Provincial Government to appoint any person as an "Authority" who has experience of a particular type. He need not be a Judicial Officer at all. If it was meant to give the "Authority" the status of a Court of law it would have been laid down in S. 15 of the Act that the person appointed as an "Authority" must be a Judicial Officer or a Magistrate. It was further contended that under sub-s. (5) of S. 15 the "Authority" cannot necessarily enforce its own orders. If the "Authority" is a Magistrate it can enforce its orders by realising the amount directed to be paid by the employer as if it were a fine imposed by him. If, however, the "Authority" is not a Magistrate it has to make an application to a Magistrate to realise the amount of the direction as if it were a fine imposed by such Magistrate. In Ss. 19, 22 and 26 of the Act the "Authority" and the "Court" are distinguished from each other. In these circumstances it could not have been intended that the "Authority" itself shall be regarded as a Court. Another argument of the learned counsel was that had the "Authority" been a Court the power to make Rules governing the procedure of the "Authority" would have been delegated by the Legislature to the High Court and that the fact that the Provincial Government can frame Rules governing the procedure of the "authority" shows that the "Authority" is to be regarded as an administrative body. The decision of the "Authority" is designated a "direction" and not a judgment".

[5] In my opinion, the arguments of the learned counsel for the respondent, deduced from the language of the Act, do not in any way indicate that the "Authority" cannot be regarded as a Civil Court. One of the fundamental tests whether a certain Tribunal is a Court or is not so is whether it exercises jurisdiction by reason of the sanction of the law or whether jurisdiction is given to it by the voluntary submission of the parties to a dispute. It is clear that in the present case the "Authority" is brought into existence by the Provincial Government in pursuance of an Act passed by the Central Legislature. This Tribunal is, therefore, created by the sovereign power and performs the delegated

functions of the sovereign power. If a dispute arises between the employee and the employer it is the function of the sovereign power to adjudicate upon this dispute. In most cases this power has been delegated by the sovereign power to Civil Courts. It is, however, open to the sovereign power to delegate its authority to a special tribunal. Section 22, Payment of Wages Act, bars the jurisdiction of the Civil Courts so far as disputes regarding the recovery of wages or any deduction from wages are concerned. In place of the Civil Court the sovereign power has created a special tribunal under S. 15 of the Act.

[6] Another important test whether a certain tribunal is or is not a Court is whether it can take cognisance of a lis and whether in exercising its functions it proceeds in a judicial manner. The provisions of the Act make it perfectly clear that as soon as an application is presented to the "Authority" it has to give notice to the other party. The application has to be heard in the presence of both parties and a decision is to be given after the hearing. The "Authority" has to enter all the particulars of the application and the pleas of the different parties in Form F appended to the Rules. The finding of the "Authority" has then to be recorded and a brief statement of the reasons for arriving at the conclusion must be appended to the finding. For the purpose of taking evidence and enforcing the attendance of witnesses the "Authority" has been given the powers of a Civil Court. If any person makes a false statement before the "Authority", the "Authority" can take action in exactly the same manner as a Civil Court would under S. 196 Criminal P.C. Chapter XXXV of the Code of Criminal Procedure can also be availed of by "Authority" and it has power to commit a person, refusing to answer or produce documents, for contempt of Court. In these circumstances I am of the opinion that the provisions of the Act and Rules make it perfectly obvious that the "Authority" performs the delegated judicial functions of the State. It must, therefore, be regarded as a Court. The fact that the amounts awarded by the "Authority" are described as directions rather than decrees and that the "Authority" as such cannot execute its own decrees cannot be regarded as determining factors. If a Tribunal exercises the judicial powers of the State it does not make the least difference whether it is designated as an "Authority" or a Commissioner or a Tribunal. The Court of Small Causes cannot execute its decrees by the sale of immovable property. Most of the decrees

have to be realised by immovable property of the judgment debtors being sold. It cannot be said that the Court of Small Causes is not a Civil Court because it cannot proceed in execution against the immovable property of a judgment-debtor.

[7] Section 17 of the Act is of the utmost importance in determining whether the "Authority" is or is not a Court. If the compensation awarded by the "Authority" exceeds Rs.300 the employer can prefer an appeal before the District Court. If the total amount of wages deducted from the employee exceeds Rs.50 he cannot also prefer an appeal to the District Court. It is clear, therefore, that if the amounts are above Rs.300 and Rs. 50 respectively, the "Authority" is to be regarded as a Court subordinate to the District Court. It would be most anomalous if it were held that if the Court directs the employer to pay a sum of Rs. 300 to the employee the "Authority" is a Court but that if the "Authority" directs the payment of a sum of Rs. 299 it is not a Court and that neither the District Court nor the High Court has power to correct the grossest abuse of authority and procedure if the amount awarded is Rupees 299. The "Authority" can by awarding a sum of Rs. 299 instead of Rs. 301 not only prevent an appeal from its decision but can deprive the High Court of all revisional jurisdiction in the matter. It appears to me, therefore, that the "Authority" under the Payment of Wages Act must be regarded as a Court.

[8] As I have mentioned already, the provisions of the Payment of Wages Act are almost identical with the provisions of the Workmen's Compensation Act. It was held by a Full Bench of the Patna High Court in I.L.R. 1941 Pat. 373¹ that a Commissioner appointed under the Workmen's Compensation Act, 1923, is a Court. The Commissioner under the Act constitutes an independent tribunal and his function is to judge and decide and not merely to enquire and advise and in judging or deciding the matters before him he has to proceed judicially and not arbitrarily. In short he satisfies all the main tests which one has to apply for determining whether a tribunal is or is not a Court. It was contended before the Full Bench that the Commissioner under the Workmen's Compensation Act was a "*persona designata*." It was held by the learned Judge that there is no antithesis between the expression "*persona*

designata" and "Court"; in other words, even a "*persona designata*" may be a Court. Whether he is a Court or not depends upon his powers and the functions which he has to discharge. The expression "*persona designata*," however, could not be appropriately used with reference to a Commissioner appointed under the Workmen's Compensation Act, because the Act itself does not single out any person by his official designation to be appointed as Commissioner nor does it say that only an official can be appointed as Commissioner. The reasoning of the Full Bench applies with full force to the "Authority" appointed under the Payment of Wages Act.

[9] The Full Bench case referred to above did not decide the question as to whether the Commissioner under the Workmen's Compensation Act was a Court subordinate to the High Court in the sense in which the expression is used in S. 115, Civil P. C., as this point was not argued before the Full Bench. Later on, however, a Division Bench of the Patna High Court took up the case that had been dealt with by the Full Bench earlier and held (*vide* A.I.R. 1942 Pat. 33²) that the Commissioner under the Workmen's Compensation Act is subject to the appellate jurisdiction of the High Court and is, therefore, a Court subordinate to the High Court within the meaning of S. 115, Civil P. C. It has been held by Tek Chand J. in A.I.R. 1938 Lah. 855³ that a Commissioner appointed under the Workmen's Compensation Act and adjudicating a claim made under the Act is a "Court subordinate to the High Court" within the meaning of S. 115, Civil P. C., or S. 44 of the Punjab Courts Act, and a petition for revision lies against an order passed by him provided all the other necessary conditions are present.

[10] The learned counsel for the respondent relied on a number of decisions in which it has been held that the Collector in making an award under the Land Acquisition Act cannot be deemed to be a Court even though he may give his award on the evidence produced before him. In dealing with the award of the Collector the Calcutta High Court pointed out in 32 Cal. 605⁴ that the Collector in making the award acts as a mere departmental officer or an agent of the Government

2. ('42) 29 A.I.R. 1942 Pat. 33 : 21 Pat. 173 : 198 I.C. 529, Mt. Dirji v. Sm. Goalin.

3. ('38) 25 A.I.R. 1938 Lah. 855 : 180 I. C. 313, Firm G. D. Gian Chand v. Abdul Hamid.

4. ('05) 32 Cal. 605, Ezra v. Secy. of State.

1. ('41) 28 A.I.R. 1941 Pat. 65 : I.L.R. (1941) 20 Pat. 373 : 192 I.C. 217 (F.B.), Mt. Dirji v. Sm. Goalin.

for the purposes of ascertaining the value of the property to enable a tender to be made to the owner of the land to be acquired and in that view he is to consider all the available information on the point which is collected before him in the form of evidence. The Privy Council, on appeal, held that the enquiry by the Land Acquisition Collector as to the value of the land and the amount of compensation to be paid for its acquisition resulting in the award is an administrative, and not a judicial, proceeding. If the owner of the land desires a judicial ascertainment of the value of the land he can require the matter to be referred by the Collector to the Court for determination. In making his award the Collector is not limited to the evidence taken before him, but is entitled to avail himself of information supplied to him without the knowledge of the owner of the land and not disclosed at the enquiry. Cases dealing with the award of the Collector under the Land Acquisition Act have, therefore, no bearing at all on the point involved in this reference.

[11] The learned counsel also relied on a Single Bench judgment of the Nagpur Court in A. I. R. 1944 Nag. 288⁵ where it was held that the "Authority" deciding disputes under the Payment of Wages Act, 1936, is not a Court subordinate to the High Court within the purview of S. 115 of the Civil P. C. The "Authority" in question is a "*persona designata*." With all respect to the learned Judge I am of the opinion that this decision does not lay down the law correctly. The learned Judge was considerably impressed by the fact that the decisions of the "Authority" are neither judgments nor decrees nor orders but are called "directions" under S. 15(2) of the Act. In my opinion the question of nomenclature does not in any way affect the case once it is held that the "Authority" under the Payment of Wages Act exercises the delegated judicial functions of the State.

[12] Reference was also made by the learned counsel for the respondent to the Full Bench judgment of this Court in (1945) P. L. R. 284⁶ in which it was held that a Tribunal under S. 59 of the United Provinces Town Improvement Act, 1919, was not a Court. My Lord the Chief Justice in his judgment has pointed out that the President and one Assessor were to be appointed by the Chief Com-

missioner for a period of two years whereas the third Member was to be appointed by the Delhi Municipal Committee for a similar period. He found it difficult to hold that such a body constituted a Court particularly when one of its members was to be appointed by a Municipal Committee which in many ways is vitally interested in the work of the Improvement Trust. Further, the three Members were to be paid by the Improvement Trust, and not out of the State or Provincial Fund, and they could be paid a monthly remuneration or by way of fees, that is, a particular sum for a particular case, or partly by a monthly remuneration and partly by fees. Such was not the usual way of paying a Court. It was, therefore, held that the mode of payment, the tenure of office, the manner of payment and the method of removal strongly suggested that it was never the intention of the Legislature to constitute this Tribunal a Court in the real sense of the word. I respectfully agreed with the view of my Lord the Chief Justice. Abdur Rahman J, however, gave a dissenting judgment and held the Tribunal to be a Court. In my opinion the case of a Tribunal under the Town Improvement Act is clearly distinguishable from the case of an "Authority" appointed by the Provincial Government under S. 15, Payment of Wages Act.

[13] For the reasons given above, I would hold that the "Authority" appointed under S. 15, Payment of Wages Act, is a Civil Court, and further that it is a Court subordinate to the High Court within the purview of S. 115, Civil P. C., and S. 44, Punjab Courts Act. With this expression of opinion I would send the case back to the learned Single Judge for final disposal.

[14] **Ram Lall J.**— I agree.

[15] **Mahajan J.**— I agree and wish to add that in the Nagpur Court a contrary view to the one expressed in A. I. R. 1944 Nag. 288⁵ was taken by Bobde J. in I. L. R. (1944) Nag. 540.⁷ In this case it was held that an application for revision under S. 115, Civil P. C., was maintainable against an order made under S. 15 (3), Payment of Wages Act. Whether the clause "save as provided above, any direction made by the 'Authority' shall be final" in S. 17 (2) of the Act excluded the revisional jurisdiction of the High Court was the point urged

5. ('44) 31 A. I. R. 1944 Nag. 288 : I L. R. (1944) Nag. 531, Turabali v. Sorabji.

6. ('45) 32 A. I. R. 1945 Lah. 313 : 222 I. C. 363 : (1945)-47 P. L. R. 284 (F. B.), Mohammad Ahmed v. Governor-General in Council.

7. ('45) 32 A. I. R. 1945 Nag. 94 : I L. R. (1944) Nag. 540, Shrinivas v. Superintendent, Government Printing Press, Nagpur.

there, as here. At page 542 of the report following observations occur :

[16] "On behalf of the non-applicant the learned Additional Government Pleader contends that the subject-matter being below the appealable value, the order of the learned Subordinate Judge was "final" as characterised in S. 17 (2) and that an application for revision under S. 115, Civil P. C., must therefore be taken as forbidden. With this contention I cannot agree. All that S. 17 (2), Payment of Wages Act, means is that, save as provided by S. 17 (1) an appeal would not lie. The word "final" in similar context has generally been construed as prohibiting an appeal but not an application for revision. This is the construction which was accepted in A. I. R. 1923 Rang. 94,⁸ I. L. R. 1938 All. 110⁹ and I. L. R. 1938 All. 702¹⁰ at pp. 707-708. The learned counsel for the applicant relies on A. I. R. 1942 Bom. 274¹¹ and A. I. R. 1941 Bom. 26¹² as instances, if not as authorities, in support of the view that an application for revision is quite admissible under the Payment of Wages Act. In the former, an application for revision was entertained and allowed when the case was of non-appealable value and in the latter a similar relief was awarded against an appellate order in case of appealable value."

[17] I express my respectful agreement with these observations. The conflict of judicial opinion in the Nagpur Court came up for consideration before Sen J. of the same Court in another Single Bench case, I. L. R. 1945 Nag. 587.¹³ In this case it was held that the High Court had power to revise an order passed by a District Court in appeal under S. 17, Payment of Wages Act. The learned Single Judge after noticing the conflict thought it unnecessary to refer the matter to a Full Bench because obviously in the case before him the order of the District Judge was clearly revisable by the High Court. It seems to me that it would lead to very strange results if it was held that the Legislature intended that orders in appealable cases under this Act were revisable by the High Court, but that orders in non-appealable cases were not subject to the revisional jurisdiction of this Court. In my opinion, the jurisdiction to revise the orders made by the "authority"

under section 15 (3), Payment of Wages Act could not depend on the sweet will and pleasure of that "authority", in other words, if the authority decided to pass an appealable order, the revisional jurisdiction of the High Court could at once be attracted but if it decided to pass non-appealable order then the revisional jurisdiction of this Court could not be invoked. It is, I think, not possible to place any other interpretation on the provisions of this Act than the one placed by my Lord the Chief Justice. The "authority" appointed under the statute exercises the powers of the sovereign and discharges the functions of a Civil Court. It is in all essential respects a Civil Court though it has been differently named. Its subordination to the District Judge, which is a Court subordinate to the High Court, was not disputed. That being so, *a fortiori* it is subordinate to this Court. This interpretation of the statute avoids all strange and absurd results, and does not in any way defeat the intentions of the Legislature as expressed by the language of the Act.

[The case was then sent back to a Single Bench which delivered the following Judgment.]

[18] **Ram Lall J.** — This case has now come back from the Full Bench which held that a revision petition lies under section 115, Civil P. C. Mr. Dina Nath Bhasin contends that K. G. Hashmat was reduced from the post of Senior Chargeman to that of Assistant Chargeman and that this reduction was done as a measure of punishment because Hashmat absented himself from duty without leave from 18th May 1942 to 30th July 1942. It was admitted by the petitioner Hashmat that he was so absent and that he was absent because he was not granted pay on the old scale which he demanded. It is contended therefore, that the reduction by way of punishment amounts to a reduction in wages. Mr. Basant Krishan on the other hand points out that in the case of the petitioner Hashmat there was no question of reduction in wages. He had been officiating as Senior Chargeman from time to time for short periods but that his substantive post was always that of a Journeyman Machinist. The fact that he was officiating in the post of a Senior Chargeman can only be looked at as a privilege granted as a temporary measure. When that period of temporary employment terminated he would naturally revert to his substantive job. It is purely for the employer to determine when and for what period an employee will be asked to serve as a

8. ('23) 10 A. I. R. 1923 Rang. 94 : 70 I. C. 135 : 11 L. B. R. 387 (F.B.), Mohammad Ebrahim Moolla v. S. R. Jandass.

9. ('38) 25 A. I. R. 1938 All. 47 : I. L. R. (1938) All. 110 : 173 I. C. 136, Ashraf v. Saith Mal.

10. ('38) 25 A. I. R. 1938 All. 456 : I. L. R. (1938) All. 702 : 176 I. C. 943 (F.B.), Chaturbhuj v. Manji Ram.

11. ('42) 29 A. I. R. 1942 Bom. 274 : I. L. R. (1942) Bom. 456 : 202 I. C. 781, Government of Bombay v. Bai Baiba Kandhabhai, Haribhai.

12. ('41) 28 A. I. R. 1941 Bom. 26 : 192 I. C. 528, Arvind Mills Ltd. v. K. R. Gadgil.

13. ('45) 32 A. I. R. 1945 Nag. 244 : I. L. R. (1945) Nag. 587, Dabidatt Dube v. Central India Electrical Supply Co. Ltd., Lahore.

temporary hand in a job carrying a higher pay than that of his substantive appointment. In the present case, for a period of six months he was told to officiate not as a Senior Charge-man but as an Assistant Chargeman. An Assistant Chargeman's job, I am informed, is higher than that of a Journeyman Machinist. In the circumstances, it appears to me that Hashmat petitioner has no legal claim to be retained in a job higher than his substantive appointment. The pay of the Senior Chargeman at the time was Rs. 160 per mensem. The calculations that have been made according to which he has been paid both for over-time and his salary have been made at the rate of Rs. 110 which is the pay of the Assistant Chargeman. I have calculated according to the data given in the petition that the over-time calculated at the rate of Rs. 110 comes to the amount that has actually been paid to him. In the circumstances, I consider that both these petitions should be allowed but having regard to all the circumstances of the case I make no order as to costs.

D.S./D.H.

Petitions allowed.

[Case No. 63.]

A. I. R. (33) 1946 Lahore 322**FULL BENCH****DIN MOHAMMAD, TEJA SINGH AND
ACHHRU RAM JJ.***Mohammad Saddiq—Defendant—
Appellant*

v.

*Ghasi Ram Plaintiff and others—
Defendants—Respondents.*

Second Appeal No. 657 of 1944, Decided on 19th March 1946, from order of Abdul Rashid and Mahajan JJ., D/ 20th December 1945.

(a) Transfer of Property Act (1882), S. 52—*Lis pendens* — Pre-emption suit — Sale after institution of suit in favour of another pre-emptor in pursuance of agreement to sell made in his favour prior to institution of pre-emption suit but after expiry of limitation to sue for pre-emption—Doctrine of *lis pendens* applies.

The doctrine of *lis pendens* applies to a case where before the institution of the suit for pre-emption an agreement to sell the property has been executed by the vendee in favour of another prospective pre-emptor with an equal right of pre-emption and subsequent to the institution of the suit, in pursuance of the agreement, a sale deed has been executed and registered in the latter's favour, after the expiry of limitation for a suit to enforce his own pre-emptive right. The sale in favour of the latter cannot defeat the plaintiff's suit: ('46) 33 A. I. R. 1946 Lah. 142 (F.B.), *Foll.* [P 325 C 2]

T. P. Act—

('45) Chitaley, S. 52, N. 21 Pt. 6.

('36) Mulla, P. 231 "Suit for pre-emption."

(b) Pre-emption—Exercise of right of—Right is effectively exercised or enforced only when complete divestiture of vendee's title and vesting of title in pre-emptor takes place.

A right of pre-emption can be said to have been effectively exercised or enforced only when the pre-emptor has become actually substituted for the vendee in the original bargain of sale. Where the pre-emptive right is sought to be enforced by means of a suit, such substitution takes place and the pre-emptive right is deemed to have been exercised or enforced only when the price has been paid by the pre-emptor into Court in compliance with the decree passed in his favour. When the right is sought to be enforced by means of a private treaty out of Court the substitution of the pre-emptor for the purchaser takes place and the pre-emptive right is exercised or enforced when the price is either paid or tendered to the purchaser and he has actually surrendered the bargain in favour of the pre-emptor. There can be no enforcement of the pre-emptive right except by complete divestiture of the vendee's title and the vesting of such title in the pre-emptor. [P 325 C 2; P 326 C 2]

(c) Transfer of Property Act (1882), S. 52—Rule of *lis pendens* applies to involuntary transfers also.

The rule of *lis pendens* applies equally to voluntary and involuntary transfers otherwise falling within its ambit. [P 327 C 2; P 328 C 1]

T. P. Act—

('45) Chitaley, S. 52, N. 31, Pt. 2.

('36) Mulla, P. 233—Involuntary alienations.

(d) Transfer of Property Act (1882), S. 54—Contract for sale does not create equitable estate.

In England the purchaser under a contract for sale is sometimes described as an equitable owner of the land, though only against any other party to the contract. In India, however, the law recognises no distinction between legal and equitable estates in this sense. S. 54, T. P. Act, makes a departure from the English law: *Case law discussed.* [P 328 C 2]

T. P. Act—

('45) Chitaley, S. 54 N. 23, Pts. 2 and 3.

('36) Mulla, P. 280, Pt. (I).

*Yashpal Gandhi and Mohd. Jamil—**for Appellant.**D. R. Sawhney—*for Respondents.**ORDER OF REFERENCE.**

Mahajan and Abdul Rashid JJ.—This second appeal arises in the following circumstances. On 21 August 1941 Mt. Khatun purchased the house in suit from Zamir Ahmad, defendant 2. The sale deed was registered on 23rd August 1941. On 25th August 1941 Mohammad Saddiq, defendant 3, served a notice (Ex. D. 5) on Mt. Khatun alleging that he had a right of pre-emption in respect of the sale made in her favour by Zamir Ahmad and that, if she would not convey the property to him, he would be forced to acquire it by means of a pre-emption suit. It appears that as a result of this notice on 22nd September 1941, Mt. Khatun executed an agreement of sale in favour of Mohammad Saddiq. She agreed to sell the property purchased by her in

favour of Mohammad Saddiq for a sum of Rs. 3,000. On 22nd August 1942 Ghasi Ram, plaintiff, instituted the present suit for pre-emption in respect of the sale of 21st August 1941. He alleged that his house was contiguous to the house sold and, therefore, he was entitled to acquire the property in preference to the vendee. During the pendency of this suit, a sale deed was executed by Mt. Khatun in pursuance of the agreement of 22nd September 1941 in favour of Mohammad Saddiq on 11th November 1942. On 15th December 1942 Mt. Khatun put in a plea in the pre-emption suit to the effect that she had conveyed the property, the subject-matter of the pre-emption suit, in favour of Mohammad Saddiq. It was at this stage that Mohammad Saddiq was made a defendant in the case. Mohammad Saddiq resisted the plaintiff's suit for pre-emption and pleaded that he had a house contiguous to the house sold and the pre-emptor had no right to acquire the property in preference to him and therefore the pre-emption suit must be dismissed. The trial Judge dismissed the plaintiff's suit and held that the plea raised by Mohammad Saddiq was a good one. Ghasi Ram, plaintiff, appealed to the Court of the District Judge. The lower appellate Court took the view that the sale by the vendee Mt. Khatun in favour of Mohammad Saddiq was completed on 11th November 1942, that is after the expiry of one year provided by law for the institution of a pre-emption suit in respect of the sale and, that being so, the rule of *lis pendens* applied to the transfer made by the vendee in favour of the subsequent transferee and he was bound by the result of the decision in the pre-emption suit brought against the vendee and could not plead that he had acquired the property under an assertion of his pre-emptive right. It has been held by a Full Bench of this Court in Civil Revision No. 322 of 1944¹ decided on the 1st June 1945 that a sale by a vendee in favour of a pre-emptor during the pendency of a suit for pre-emption but after the expiry of the period of limitation does not entitle the subsequent transferee to be impleaded as a party to the suit so as to be able to defeat the right of pre-emption claimed by the plaintiff. The view taken by the Full Bench had been expressed in certain decisions of this Court prior to the Full Bench

decision. The learned Additional District Judge following those decisions negatived the plea raised by the subsequent purchaser, set aside the decree of the trial Judge dismissing the plaintiff's suit and granted the plaintiff a decree for pre-emption on payment of Rs. 3,000. Mohammad Saddiq has now preferred a second appeal to this Court.

[2] Mr. Gauba, the learned counsel for appellant, argued that the rule laid down by the Full Bench has no application to the fact and circumstances of the present case. Mr. Gauba's contention raised two questions of law: (1) That the doctrine of *lis pendens* has no application to a case where before the institution of a suit for pre-emption, an agreement to sell the property has been executed by the vendee in favour of the prospective pre-emptor, and subsequent to the institution of the suit for pre-emption, in pursuance of the agreement a sale deed is executed and registered in favour of the subsequent purchaser. It was urged that the transfer during the pendency of the suit was in pursuance of a right to purchase the property that had been acquired on the foot of the agreement of sale executed before the date of the suit. In other words, the transfer *pendente lite* was merely an enforcement of a pre-existing right and therefore the rule of *lis pendens* could not affect it. (2) That the subsequent purchaser having a pre-emptive right in respect of the sale had exercised that right before the date of the suit by getting an agreement of sale from the vendee in his favour and having exercised his pre-emptive right by getting a contract of sale in his favour the period of limitation of one year within which a pre-emption suit could be brought by him does not affect him because his right to defeat his rival pre-emptor was still subsisting at the time when the sale deed was executed in his favour. The right of the second purchaser to buy the property being still subsisting on the date of the transfer it was contended that he could defeat the pre-emption suit on the ground that the plaintiff had no better right than himself to acquire the property. This argument was sought to be supported on the basis of the following observation that occur in the judgment of Mr. Justice Achhru Ram who delivered the Full Bench judgment in Civil Revision No. 332 of 1944¹:

[3] "The reason for not applying the rule of *lis pendens* to the case of a subsequent transferee who himself had a right of pre-emption either equal or superior to that of the plaintiff is that if he had brought a suit to enforce his pre-emptive right

¹ Reported in ('46) 33 A. I. R. 1946 Lah. 142 : 48 P. L. R. 28 (F.B.), Mt. Sant Kaur v. Teja Singh.

even though subsequent to the institution of the suit by the plaintiff, his right to get a decree and to acquire the property on due compliance with the terms of the decree could not be affected by the fact of the plaintiff having instituted his suit earlier, and there is no reason why he should be placed in a worse position if without the necessity of a suit the original vendee is prepared to admit his claim and to agree to his substitution for himself in the original bargain. Where the subsequent vendee has still the means of coercing by means of legal action, the original vendee into surrendering the bargain in his favour, a surrender as a result of a private treaty, and out of Court in recognition of the right to compel such surrender by means of suit cannot properly be regarded as a voluntary transfer so as to attract the application of the rule of *lis pendens*. The correct way to look at the matter, in a case of this kind, is to regard the subsequent transferee as having simply been substituted for the vendee in the original bargain of sale. He can defend the suit on all the pleas which he could have taken had the sale been initially in his own favour. However, where the subsequent transferee has lost the means of making use of the coercive machinery of the law to compel the vendee to surrender the original bargain to him, a re-transfer of the property in the former's favour cannot be looked upon as anything more than a voluntary transfer in the former's favour of such title as he had himself acquired under the original sale."

[4] As at present advised, it appears to me that the contentions of Mr. Gauba have considerable force. Mohammad Saddiq had available to him at the time when he obtained the sale deed from Mt. Khatun, the coercive machinery for acquiring the property from the vendee on the basis of the agreement of 22nd September 1941. It is no doubt true that he had lost his right to institute a pre-emption suit but that fact loses importance in view of the fact that he had already enforced that right by coercing the vendee under the threat of a pre-emption suit in executing an agreement of sale of that property in his favour. Mr. Sawhney, the learned counsel for the respondent, placed reliance on the provision of section 54, Transfer of Property Act. In that section it is laid down that a contract for the sale of immoveable property is a contract, that sale of such property shall take place on terms settled between the parties and it does not, of itself, create interest in or charge on such property. The learned counsel argued that this contract of sale, dated 22nd September 1941, did not create any interest in favour of Mohammad Saddiq in the property sold and that his interest as owner of the property came into existence only on the 11th November 1942 when the sale deed in respect of that property was registered in his favour. The learned counsel contended that in these circumstances the rule laid down by the Full Bench in Civil Revision No. 332 of 1944¹ had full appli-

cation and that the agreement taken on 22nd September 1941 did not take out the present case from the ambit of the Full Bench ruling.

[5] It appears to us that the matter is of considerable importance and is of frequent occurrence and should be authoritatively decided. We would, therefore, direct that this case be laid before His Lordship the Chief Justice for constituting a larger Bench to hear this appeal. We would like to suggest that preferably the matter should be heard by the Bench that decided Civil Revision No. 332 of 1944¹ so that the scope of that decision may be fully clarified.

Judgment of the Full Bench

[6] **Achhru Ram J.**—The facts giving rise to this reference may be briefly stated as follows. On 21st August 1941 Mt. Khatun, defendant 1, purchased a house situate in *gali Rahuji* in the city of Delhi from Zamir Ahmad, defendant 2, for a consideration of Rs. 3,000. The sale deed which was executed on 21st August 1941 was registered two days later, on 23rd August 1941. Mohammad Sadiq defendant 3, has a house contiguous to the house in suit, and, on 30th August 1941, he served a notice on Mt. Khatun asking her to re-transfer, within a month of the receipt of the notice, the aforesaid house to him on receipt of the sale price, and informing her that in case of her default, a suit for pre-emption would be brought against her. On 19th September 1941 Ghasi Ram plaintiff, who also had got a house contiguous to the suit house, served a similar notice on Mt. Khatun in which he called upon her to re-convey the house purchased by her to him within a period of 15 days on receipt of a sum of Rs. 3,000. On 22nd September 1941, Mt. Khatun executed an agreement in favour of Mohammad Saddiq whereby she agreed to transfer the house in dispute to him for a sum of Rupees 3,050 out of which Rs. 200 were said to have been received by way of earnest money and the balance was agreed to be paid at the time of the registration of the sale deed. It was stated in the agreement that Mt. Khatun had agreed to transfer the house in recognition of Mohammad Saddiq's superior pre-emptive right. On 29th September 1941, Mt. Khatun sent reply to Ghasi Ram's notice wherein she informed him of her having executed the above mentioned agreement in favour of Mohammad Saddiq. On 22nd August 1942 Ghasi Ram brought a suit against Mt. Khatun for possession of the house by pre-emption. He impleaded only Mt. Khatun and her vendor

Zamir Ahmad as defendants 1 and 2. On 11th November 1942, Mt. Khatun sold the house to Mohammad Saddiq by execution of a properly registered sale deed. In her written statement filed in Ghasi Ram's suit she pleaded that she had nothing further to do with the house in suit which she had resold to Mohammad Saddiq. The latter was thereon impleaded as a defendant. He contested the suit on the plea that he had a right of pre-emption equal to that of the plaintiff himself. The plaintiff, while admitting Mohammad Saddiq's pre-emptive right, pleaded that there was in fact no real sale in the latter's favour; that the alleged sale was a mere paper-transaction and was never intended to transfer ownership in his favour, and that, in any case, the sale, having taken place after the expiry of the period of limitation prescribed for a pre-emption suit, and during the pendency of the plaintiff's own suit for pre-emption, was hit by the rule of *lis pendens* and could not affect the plaintiff's right to a decree. The learned Subordinate Judge held that the sale by Mt. Khatun in favour of Mohammad Saddiq was a genuine sale, and that although made after the expiry of limitation for a pre-emption suit it had been made in pursuance of agreement to sell which itself had been entered into at a time when Mohammad Saddiq's right to sue for pre-emption was still subsisting and in express recognition of such right. He was of the opinion that, under the circumstances, the rule of *lis pendens* was inapplicable, and that the plaintiff's pre-emptive right not being superior to that of Mohammad Saddiq, he was not entitled to succeed. In this view of the case, the plaintiff's suit was dismissed. On appeal the learned Additional District Judge of Delhi held the rule of *lis pendens* to be applicable to the sale in Mohammad Saddiq's favour and, allowing the plaintiff's appeal, decreed his claim. Mohammad Saddiq came up in second appeal to this Court. The appeal was heard by a Division Bench. It was contended by the learned counsel for the appellant before the Bench that the doctrine of *lis pendens* could have no application to a case where before the institution of the suit for pre-emption, an agreement to sell the property had been executed by the vendee in favour of another prospective pre-emptor with an equal right of pre-emption, and, subsequent to the institution of the suit, in pursuance of the agreement, a sale deed had been executed and registered in the latter's favour, after the expiry of limitation for a suit to enforce his own pre-emptive right. In

support of this contention, reliance was placed on certain observations in the judgment of the Full Bench in Civil Rev. No. 332 of 1944¹ (since reported in 48 P.L.R. 28). Considering the matter to be of importance, the Division Bench decided to refer the case to a Full Bench.

[7] After hearing the learned counsel for the parties, I am inclined to the opinion that the sale in the appellant's favour, although made in performance of an agreement entered into at a time when his right to sue for pre-emption was still subsisting and in express recognition of such right, is hit by the doctrine of *lis pendens* and cannot be allowed to defeat the plaintiff's suit. With all respect to my brother Mahajan, who appears in his order of reference to take a contrary view, I find myself unable to accept the contention that by securing the agreement dated 22nd September 1941 in his favour the appellant can be deemed to have enforced his pre-emptive right. It is quite true that, in the notice served by him on Mt. Khatun he asserted his superior right as against her and actually threatened to take steps to enforce that right by means of an action unless she agreed to his exercise of the right, out of Court by surrendering the house to him on receipt of the full price. It is also true that she admitted the correctness of his assertion and formally agreed to convey the property to him by means of a proper sale deed. However the whole transaction fell far short of an actual exercise of enforcement of the pre-emptive right. A right of pre-emption can be said to have been effectively exercised or enforced only when the pre-emptor has become actually substituted for the vendee in the original bargain of sale. Till such substitution takes place the vendee remains the owner of the property purchased by him and the prospective pre-emptor cannot claim to have any right to or in the subject-matter of the sale. Where the pre-emptive right is sought to be enforced by means of a suit, such substitution takes place, and the pre-emptive right is deemed to have been exercised or enforced, only when the price has been paid by the pre-emptor into Court in compliance with the decree passed in his favour. Till such payment has been made, the act of the pre-emptor in instituting the suit for pre-emption amounts to no more than a mere assertion of the right, which becomes a successful assertion of the right when the suit culminates in a decree. There is however a vast difference between a mere assertion, albeit a successful assertion, of the

pre-emptive right and the exercise or enforcement of that right. Mahmood J. in 12 All. 234² went to the extent of holding that the enforcement of pre-emption is not deemed to have taken place unless, by virtue of his pre-emption, the pre-emptor has obtained possession of the pre-emptional tenement, either under a voluntary surrender thereof by the buyer, or under a decree. In our province, however, being put in possession of the pre-emptional tenement has never been insisted upon as an essential pre-requisite of the enforcement of the pre-emptive right, and it has been considered enough for the divestiture of the vendee's title and the vesting of the title in the pre-emptor, which by common consent the enforcement of a pre-emptive right necessarily pre-supposes, that the pre-emptor has duly deposited in Court the price as required by the decree. The form of the decree in a pre-emption suit, as prescribed in O. 20, R. 14, Civil P. C., itself clearly shows that till such deposit is made the pre-emptive right cannot be said to have been enforced, because in case of the failure of the plaintiff to make the deposit in strict compliance with the terms of the decree, his suit is to stand dismissed. It is therefore not necessary to refer to the decided cases dealing with this matter. However, the following observations of Sir Meredith Plowden in his judgment in 136 P.R. 1894³ may be quoted with advantage :

[8] "A right to the offer of a thing about to be sold is not identical with a right to the thing itself, and that is the primary right of the pre-emptor. The secondary right is to follow the thing sold without a proper offer to the pre-emptor, and to acquire it if he thinks fit in spite of the sale made in disregard of his preferential right. But even a decree in suit brought for the purpose of enforcing this secondary right does not give the pre-emptor a right to the thing sold. He does not acquire that right until he had paid the price fixed in the decree within the prescribed period, and this he need not do unless he chooses. If he does so, the right, title and interest of the vendor which had meantime vested in the vendee is divested and vests in the pre-emptor and then, and not till then, he has a right to the land itself."

[9] Similar observations are to be found in the judgment of Rattigan J. in 94 P. R. 1902.⁴ The matter is clinched by the following observations in the judgment of my brother Din Mohammad in the Full Bench case in I. L. R. 1942 Lah. 155⁵ :

2. ('90) 12 All. 234 (F.B.), Deokinandan v. Sri Ram.

3. ('94) 136 P. R. 1894, Dhani Nath v. Budhu.

4. ('02) 94 P. R. 1902, Lashkari Mal v. Ishar Singh.

5. ('41) 28 A. I. R. 1941 Lah. 433 : I.L.R. (1942) Lah. 155 : 197 I. C. 227 (F.B), Madho Singh v. James R. R. Skinner.

[10] "In my view, the right of pre-emption does not exist independently of its exercise so as to invalidate transactions which take place in defiance of it. It is no doubt a right of preferential purchase but so long as it is held in abeyance, it is ineffective altogether. In fact, under O. 20, R. 14, Civil P. C., a claim to pre-emption, if decreed, becomes effective only when the money is paid into Court and, as laid down by their Lordships of the Privy Council in 44 Cal. 675⁶ the vendee is entitled to the rents and profits so long as the purchase-money is not paid."

[11] Where the pre-emptive right is sought to be enforced not by means of a suit but by means of a private treaty out of Court, the substitution of the pre-emptor for the purchaser takes place and the pre-emptive right can be said to have been exercised or enforced, when the price is either paid or tendered to the purchaser and he has actually surrendered the bargain in favour of the pre-emptor. There can be no enforcement of the pre-emptive right except by complete divestiture of the vendee's title and the vesting of such title in the pre-emptor. Generally, the vendee will not agree to surrender his title under the sale in favour of the pre-emptor except on payment by the latter of the price paid by him to the vendor. However, the possibility of the vendee agreeing to surrender the bargain without insisting on immediate payment of the sale price cannot be excluded and therefore there may be cases—of course such cases will be few and far between—in which the right of pre-emption may be effectively exercised even without paying or tendering the price though the following observations in 3 S. D.A.N.W.P. 171⁷ at p. 176 would seem to show that the tender of the sale price is a condition precedent for the exercise of such right :

[12] "We, however, are disposed to consider the latter view as the more correct, as the pre-emptor could have no preferential right till he had tendered the full price."

[13] In spite of the agreement executed in the appellant's favour by the original purchaser on 22nd September 1941, the said purchaser remained the owner of the house and there was no substitution of Mohammad Saddiq in the bargain of sale. In fact, there was no substitution in this case even on 11th November 1942 when the property was actually conveyed to the appellant and the sale price was paid by him because by that time the appellant had no subsisting right

6. ('16) 3 A. I. R. 1916 P. C. 179 : 44 Cal. 675 : 44 I. A. 80 : 39 I. C. 958 (P. C.), Deonandhan Prashed Singh v. Ramdhari Chowdhri.

7. (1865) 3 S. D. A. N. W. P. 171, Rai Manick Chand v. Baboo Rameshwar Rae.

left to claim his own substitution in the original bargain. The sale in his favour was only a conveyance of Mt. Khatun's own title to the house in pursuance of the agreement to sale made by her, and it could make no difference to the incidents of this conveyance whether the agreement to sale had been made on account of the appellant having the power, at the time it was made, to displace Mt. Khatun from the ownership of the house by enforcing his right of pre-emption or otherwise. The purchase of the house by the appellant cannot be regarded as a purchase in exercise or enforcement of a superior pre-emptive right which right had in fact become unenforceable long before the purchase. It does not, therefore, fall within the category of transfers which according to the judgment of the Full Bench in 48 P. L. R. 28¹ are excepted from the operation of the doctrine of *lis pendens* and that doctrine fully applies to it. It appears to have been urged before the Division Bench which has referred this case to a Full Bench, — it was certainly urged before us — that the sale in the appellant's favour having been made at a time when, though he had no subsisting right to sue for pre-emption, he had still the means of coercing Mt. Khatun, by instituting a suit for specific performance of the agreement executed by her, to transfer the house in his favour, could not be regarded as a voluntary transfer so as to attract the application of the doctrine of *lis pendens*. Support for this contention was sought from the following passage in the Full Bench judgment:

[14] "The reason for not applying the rule of *lis pendens* to the case of a subsequent transferee who himself had a right of pre-emption either equal or superior to that of the plaintiff is that if he had brought a suit to enforce his pre-emptive right, even though subsequent to the institution of the suits by the plaintiff, his right to get a decree and to acquire the property on due compliance with the terms of the decree could not be affected by the fact of the plaintiff having instituted his suit earlier, and there is no reason why he should be placed in a worse position if without the necessity of a suit the original vendee is prepared to admit his claim and to agree to his substitution for himself in the original bargain. Where the subsequent vendee has still the means of coercing, by means of legal action, the original vendee into surrendering the bargain in his favour, a surrender as a result of a private treaty, and out of Court in recognition of the right to compel such surrender by means of a suit cannot properly be regarded as a voluntary transfer so as to attract the application of the rule of *lis pendens*. The correct way to look at the matter, in a case of this kind, is to regard the subsequent transferee as having simply been substituted for the vendee in the original bargain of sale. He can defend the suit on all the pleas which he

could have taken had the sale been initially in his own favour. However where the subsequent transferee has lost the means of making use of the coercive machinery of the law to compel the vendee to surrender the original bargain to him, retransfer of the property in the former's favour cannot be looked upon as anything more than a voluntary transfer in the former's favour of such title as he had himself acquired under the original sale."

[15] I, however, fail to see how the appellant can derive any assistance from this passage. As the context clearly shows, the expression "legal action" in the above passage, has reference only to the action for the enforcement of the pre-emptive right and the words "the coercive machinery of the law" connote only the machinery which is set in motion by the institution of such an action. In order to save a transfer from the operation of the rule of *lis pendens*, the "legal action" which the subsequent vendee, at the time of the sale in his favour, has the right to maintain must be an action by which he can compel the original vendee to surrender the bargain in his favour, and "the coercive machinery of the law" which is available to him at that time must be a machinery which can substitute him for the first vendee in the original bargain of purchase. If he had, when the transfer in his favour took place, a subsisting right to maintain such an action and to set such coercive machinery of the law in motion, his position is not worsened if he is able to induce the first vendee to surrender the bargain in his favour without his bringing the action and setting the machinery of law in motion. However if the "legal action" which he has the right to maintain, and "the coercive machinery of the law" of which he can avail himself cannot achieve this, the mere circumstance that they can enable him, in the circumstances to wrest the property from the first vendee cannot affect the application of the doctrine of *lis pendens*. It is not every transfer *pendente lite* which is made under threat of legal proceedings, or in enforcement of a pre-existing legal right, or in performance of a pre-existing legal obligation, or which can otherwise be regarded as an involuntary transfer, that is excepted from the operation of that doctrine. I may note that the words "cannot properly be regarded as a voluntary transfer so as to attract the application of the rule of *lis pendens*" in the judgment of the Full Bench have been used merely to describe the nature of the transfer that was being spoken of and should not be taken to confine the operation of the doctrine of *lis pendens* merely to voluntary transfers. The rule of *lis pendens* applies equally to volun-

tary and involuntary transfers otherwise falling within its ambit. In spite of the express exclusion of execution sales from the operation of the Transfer of Property Act the rule has been held applicable, on general principles, to such sales even in provinces where that Act is in force, although section 52 of the Act giving statutory recognition to the rule cannot govern those sales.

[16] Mr. Gandhi, relying on the judgment in A.I.R. 1930 Lah. 131⁸ contended that the agreement dated 22nd September 1942 had the effect of transferring immediately at least the equitable title in the suit-house to Mohammad Saddiq and that the latter could resist the plaintiff's suit for pre-emption on the strength of such equitable title, even though the subsequently acquired legal title could not avail him for the purpose. At the time the agreement of 22nd September 1941 was executed, S. 54, Transfer of Property Act, was in force in the locality in which the house which was the subject-matter of agreement, was situate. By notification No. F. 844/36 dated 15th January 1937, the provisions of Ss. 54, 107 and 128, T. P. Act, were extended to the following areas in the province of Delhi: (a) Area within the jurisdiction of the Delhi Municipal Committee. (b) Area within the jurisdiction of the New Delhi Municipal Committee. (c) Area within jurisdiction of the Notified Area Committee, Civil Lines. (d) Area within the jurisdiction of the Notified Area Committee, Fort. It is not disputed that the suit house is situate within the jurisdiction of the Delhi Municipal Committee. The concluding para. of S. 54, Transfer of Property Act, runs as follows:

[17] "A contract for the sale of immovable property is a contract that a sale of such property shall take place on terms settled between the parties. It does not, of itself, create any interest in or charge on such property."

[18] This paragraph makes a departure from the English law under which the purchaser, by virtue of the contract of sale, becomes in equity the owner of the property from the date of the contract. The principle of English law has been expressly held by the Privy Council in 44 Cal. 542⁹ to be inapplicable to places where the Transfer of Property Act is in force. It does not necessarily mean that the distinction between a legal and an equitable estate is recognized in places where the Act is not in force. In fact there is abundant authority that this dis-

8. ('30) 17 A. I. R. 1930 Lah. 131 : 120 I. C. 538, Tomlinson v. W. F. Harding.
9. ('16) 3 A. I. R. 1916 P. C. 139 : 44 Cal. 542 : 44 I. A. 15 : 38 I. C. 938 (P. C.), Maung Shwe Goh v. Maung Inn.

inction has never been recognized in this country. Reference may in this connection be made to the judgments of their Lordships of the Judicial Committee in 9 Beng. L.R. 377,¹⁰ 31 Cal. 57¹¹ and 10 Pat. 851.¹² In 31 Cal. 57¹¹ their Lordships made the following observations:

[19] "The law of India, speaking broadly, knows nothing of the distinction between legal and equitable property in the sense in which that was understood when equity was administered by the Court of Chancery in England."

[20] In the judgment in the Patna case¹³ the following observations are to be found:

[21] "The Indian law does not recognize legal and equitable estates. By that law, therefore, there can be but one owner and where the property is vested in a trustee, the owner must, their Lordships think, be the trustee."

[22] In I. L. R. 1942 Lah. 79,¹³ Beckett J. in delivering the judgment of a Full Bench of this Court said:

[23] "In England the purchaser under a contract of sale is sometimes described as the equitable owner of the land, though only against any other party to the contract. In India, however, the law recognizes no distinction between legal and equitable estates in this sense."

[24] Even the judgment in A.I.R. 1930 Lah. 131⁸ does not lay down any contrary rule. It is true that the seller in that case was regarded as a trustee of the property for the purchaser till the actual completion of the sale, and similarly the purchaser was held to be a trustee for the seller of the sale price till that time. The word "trust" appears to have been used for the purpose of making an equitable adjustment of the respective claims of the parties. In place of rent claimed by the seller from the purchaser, who, prior to the execution of the agreement for sale, was in occupation of the premises as a tenant under the seller, for the period between the date of the agreement and date of the actual sale, decree was passed in his favour not for the rent for that period at the stipulated rate but for interest on the sale price for the same period. Even if the seller is to be regarded as a trustee for the purchaser of the property the former has contracted to sell to the latter, during the period intervening between the execution of the agree-

10. ('72) 9 Beng. L. R. 377 : I. A. Sup. Vol. 47 : 2 Suther. 692 : 3 Sar 82 (P. C.), Jatindra Mohan Tagore v. Ganedra Mohan Tagore.

11. ('04) 31 Cal. 57 : 30 I. A. 238 : 8 Sar 554 (P. C.), Webb v. Macpherson.

12. ('31) 18 A.I.R. 1931 P. C. 196 : 10 Pat. 851 : 58 I. A. 279 : 133 I. C. 705 (P. C.), Chhatra Kumari Devi v. Mohan Bikram Shab.

13. ('41) 28 A.I.R. 1941 Lah. 407 : I.L.R. (1942) Lah. 79 : 197 I. C. 282 (F. B.), Mt. Shankri v. Milkha Singh.

there, as here. At page 542 of the report following observations occur :

[16] "On behalf of the non-applicant the learned Additional Government Pleader contends that the subject-matter being below the appealable value, the order of the learned Subordinate Judge was "final" as characterised in S. 17 (2) and that an application for revision under S. 115, Civil P. C., must therefore be taken as forbidden. With this contention I cannot agree. All that S. 17 (2), Payment of Wages Act, means is that, save as provided by S. 17 (1) an appeal would not lie. The word "final" in similar context has generally been construed as prohibiting an appeal but not an application for revision. This is the construction which was accepted in A. I. R. 1923 Rang. 94,⁸ I. L. R. 1938 All. 110⁹ and I. L. R. 1938 All. 702¹⁰ at pp. 707-708. The learned counsel for the applicant relies on A. I. R. 1942 Bom. 274¹¹ and A. I. R. 1941 Bom. 26¹² as instances, if not as authorities, in support of the view that an application for revision is quite admissible under the Payment of Wages Act. In the former, an application for revision was entertained and allowed when the case was of non-appealable value and in the latter a similar relief was awarded against an appellate order in case of appealable value."

[17] I express my respectful agreement with these observations. The conflict of judicial opinion in the Nagpur Court came up for consideration before Sen J. of the same Court in another Single Bench case, I. L. R. 1945 Nag. 587.¹³ In this case it was held that the High Court had power to revise an order passed by a District Court in appeal under S. 17, Payment of Wages Act. The learned Single Judge after noticing the conflict thought it unnecessary to refer the matter to a Full Bench because obviously in the case before him the order of the District Judge was clearly revisable by the High Court. It seems to me that it would lead to very strange results if it was held that the Legislature intended that orders in appealable cases under this Act were revisable by the High Court, but that orders in non-appealable cases were not subject to the revisional jurisdiction of this Court. In my opinion, the jurisdiction to revise the orders made by the "authority"

under section 15 (3), Payment of Wages Act could not depend on the sweet will and pleasure of that "authority", in other words, if the authority decided to pass an appealable order, the revisional jurisdiction of the High Court could at once be attracted but if it decided to pass non-appealable order then the revisional jurisdiction of this Court could not be invoked. It is, I think, not possible to place any other interpretation on the provisions of this Act than the one placed by my Lord the Chief Justice. The "authority" appointed under the statute exercises the powers of the sovereign and discharges the functions of a Civil Court. It is in all essential respects a Civil Court though it has been differently named. Its subordination to the District Judge, which is a Court subordinate to the High Court, was not disputed. That being so, *a fortiori* it is subordinate to this Court. This interpretation of the statute avoids all strange and absurd results, and does not in any way defeat the intentions of the Legislature as expressed by the language of the Act.

[The case was then sent back to a Single Bench which delivered the following Judgment.]

[18] **Ram Lall J.** — This case has now come back from the Full Bench which held that a revision petition lies under section 115, Civil P. C. Mr. Dina Nath Bhasin contends that K. G. Hashmat was reduced from the post of Senior Chargeman to that of Assistant Chargeman and that this reduction was done as a measure of punishment because Hashmat absented himself from duty without leave from 18th May 1942 to 30th July 1942. It was admitted by the petitioner Hashmat that he was so absent and that he was absent because he was not granted pay on the old scale which he demanded. It is contended therefore, that the reduction by way of punishment amounts to a reduction in wages. Mr. Basant Krishan on the other hand points out that in the case of the petitioner Hashmat there was no question of reduction in wages. He had been officiating as Senior Chargeman from time to time for short periods but that his substantive post was always that of a Journeyman Machinist. The fact that he was officiating in the post of a Senior Chargeman can only be looked at as a privilege granted as a temporary measure. When that period of temporary employment terminated he would naturally revert to his substantive job. It is purely for the employer to determine when and for what period an employee will be asked to serve as a

8. ('23) 10 A. I. R. 1923 Rang. 94 : 70 I. C. 135 : 11 L. B. R. 387 (F.B.), Mohammad Ebrahim Moolla v. S. R. Jandass.

9. ('38) 25 A. I. R. 1938 All. 47 : I. L. R. (1938) All. 110 : 173 I. C. 136, Ashraf v. Saith Mal.

10. ('38) 25 A. I. R. 1938 All. 456 : I. L. R. (1938) All. 702 : 176 I. C. 943 (F.B.), Chaturbhuj v. Manji Ram.

11. ('42) 29 A. I. R. 1942 Bom. 274 : I. L. R. (1942) Bom. 456 : 202 I. C. 781, Government of Bombay v. Bai Baiba Kandhabhai, Haribhai.

12. ('41) 28 A. I. R. 1941 Bom. 26 : 192 I. C. 528, Arvind Mills Ltd. v. K. R. Gadgil.

13. ('45) 32 A. I. R. 1945 Nag. 244 : I. L. R. (1945) Nag. 587, Dabidatt Dube v. Central India Electrical Supply Co. Ltd., Lahore.

temporary hand in a job carrying a higher pay than that of his substantive appointment. In the present case, for a period of six months he was told to officiate not as a Senior Charge-man but as an Assistant Chargeman. An Assistant Chargeman's job, I am informed, is higher than that of a Journeyman Machinist. In the circumstances, it appears to me that Hashmat petitioner has no legal claim to be retained in a job higher than his substantive appointment. The pay of the Senior Chargeman at the time was Rs. 160 per mensem. The calculations that have been made according to which he has been paid both for over-time and his salary have been made at the rate of Rs. 110 which is the pay of the Assistant Chargeman. I have calculated according to the data given in the petition that the over-time calculated at the rate of Rs. 110 comes to the amount that has actually been paid to him. In the circumstances, I consider that both these petitions should be allowed but having regard to all the circumstances of the case I make no order as to costs.

D.S./D.H.

Petitions allowed.

[Case No. 63.]

A. I. R. (33) 1946 Lahore 322**FULL BENCH****DIN MOHAMMAD, TEJA SINGH AND
ACHHRU RAM JJ.***Mohammad Saddiq—Defendant—
Appellant*

v.

*Ghasi Ram Plaintiff and others—
Defendants—Respondents.*

Second Appeal No. 657 of 1944, Decided on 19th March 1946, from order of Abdul Rashid and Mahajan JJ., D/ 20th December 1945.

(a) Transfer of Property Act (1882), S. 52—*Lis pendens* — Pre-emption suit — Sale after institution of suit in favour of another pre-emptor in pursuance of agreement to sell made in his favour prior to institution of pre-emption suit but after expiry of limitation to sue for pre-emption—Doctrine of *lis pendens* applies.

The doctrine of *lis pendens* applies to a case where before the institution of the suit for pre-emption an agreement to sell the property has been executed by the vendee in favour of another prospective pre-emptor with an equal right of pre-emption and subsequent to the institution of the suit, in pursuance of the agreement, a sale deed has been executed and registered in the latter's favour, after the expiry of limitation for a suit to enforce his own pre-emptive right. The sale in favour of the latter cannot defeat the plaintiff's suit: ('46) 33 A. I. R. 1946 Lah. 142 (F.B.), *Foll.* [P 325 C 2]

T. P. Act—

('45) Chitaley, S. 52, N. 21 Pt. 6.

('36) Mulla, P. 231 "Suit for pre-emption."

(b) Pre-emption—Exercise of right of—Right is effectively exercised or enforced only when complete divestiture of vendee's title and vesting of title in pre-emptor takes place.

A right of pre-emption can be said to have been effectively exercised or enforced only when the pre-emptor has become actually substituted for the vendee in the original bargain of sale. Where the pre-emptive right is sought to be enforced by means of a suit, such substitution takes place and the pre-emptive right is deemed to have been exercised or enforced only when the price has been paid by the pre-emptor into Court in compliance with the decree passed in his favour. When the right is sought to be enforced by means of a private treaty out of Court the substitution of the pre-emptor for the purchaser takes place and the pre-emptive right is exercised or enforced when the price is either paid or tendered to the purchaser and he has actually surrendered the bargain in favour of the pre-emptor. There can be no enforcement of the pre-emptive right except by complete divestiture of the vendee's title and the vesting of such title in the pre-emptor.

[P 325 C 2; P 326 C 2]

(c) Transfer of Property Act (1882), S. 52—Rule of *lis pendens* applies to involuntary transfers also.

The rule of *lis pendens* applies equally to voluntary and involuntary transfers otherwise falling within its ambit.

[P 327 C 2; P 328 C 1]

T. P. Act—

('45) Chitaley, S. 52, N. 31, Pt. 2.

('36) Mulla, P. 233—Involuntary alienations.

(d) Transfer of Property Act (1882), S. 54—Contract for sale does not create equitable estate.

In England the purchaser under a contract for sale is sometimes described as an equitable owner of the land, though only against any other party to the contract. In India, however, the law recognises no distinction between legal and equitable estates in this sense. S. 54, T. P. Act, makes a departure from the English law: *Case law discussed.*

[P 328 C 2]

T. P. Act—

('45) Chitaley, S. 54 N. 23, Pts. 2 and 3.

('36) Mulla, P. 280, Pt. (I).

Yashpal Gandhi and Mohd. Jamil—

for Appellant.

*D. R. Sawhney—*for Respondents.**ORDER OF REFERENCE.**

Mahajan and Abdul Rashid JJ.—This second appeal arises in the following circumstances. On 21 August 1941 Mt. Khatun purchased the house in suit from Zamir Ahmad, defendant 2. The sale deed was registered on 23rd August 1941. On 25th August 1941 Mohammad Saddiq, defendant 3, served a notice (Ex. D. 5) on Mt. Khatun alleging that he had a right of pre-emption in respect of the sale made in her favour by Zamir Ahmad and that, if she would not convey the property to him, he would be forced to acquire it by means of a pre-emption suit. It appears that as a result of this notice on 22nd September 1941, Mt. Khatun executed an agreement of sale in favour of Mohammad Saddiq. She agreed to sell the property purchased by her in

favour of Mohammad Saddiq for a sum of Rs. 3,000. On 22nd August 1942 Ghasi Ram, plaintiff, instituted the present suit for pre-emption in respect of the sale of 21st August 1941. He alleged that his house was contiguous to the house sold and, therefore, he was entitled to acquire the property in preference to the vendee. During the pendency of this suit, a sale deed was executed by Mt. Khatun in pursuance of the agreement of 22nd September 1941 in favour of Mohammad Saddiq on 11th November 1942. On 15th December 1942 Mt. Khatun put in a plea in the pre-emption suit to the effect that she had conveyed the property, the subject-matter of the pre-emption suit, in favour of Mohammad Saddiq. It was at this stage that Mohammad Saddiq was made a defendant in the case. Mohammad Saddiq resisted the plaintiff's suit for pre-emption and pleaded that he had a house contiguous to the house sold and the pre-emptor had no right to acquire the property in preference to him and therefore the pre-emption suit must be dismissed. The trial Judge dismissed the plaintiff's suit and held that the plea raised by Mohammad Saddiq was a good one. Ghasi Ram, plaintiff, appealed to the Court of the District Judge. The lower appellate Court took the view that the sale by the vendee Mt. Khatun in favour of Mohammad Saddiq was completed on 11th November 1942, that is after the expiry of one year provided by law for the institution of a pre-emption suit in respect of the sale and, that being so, the rule of *lis pendens* applied to the transfer made by the vendee in favour of the subsequent transferee and he was bound by the result of the decision in the pre-emption suit brought against the vendee and could not plead that he had acquired the property under an assertion of his pre-emptive right. It has been held by a Full Bench of this Court in Civil Revision No. 322 of 1944¹ decided on the 1st June 1945 that a sale by a vendee in favour of a pre-emptor during the pendency of a suit for pre-emption but after the expiry of the period of limitation does not entitle the subsequent transferee to be impleaded as a party to the suit so as to be able to defeat the right of pre-emption claimed by the plaintiff. The view taken by the Full Bench had been expressed in certain decisions of this Court prior to the Full Bench

decision. The learned Additional District Judge following those decisions negated the plea raised by the subsequent purchaser, set aside the decree of the trial Judge dismissing the plaintiff's suit and granted the plaintiff a decree for pre-emption on payment of Rs. 3,000. Mohammad Saddiq has now preferred a second appeal to this Court.

[2] Mr. Gauba, the learned counsel for appellant, argued that the rule laid down by the Full Bench has no application to the fact and circumstances of the present case. Mr. Gauba's contention raised two questions of law: (1) That the doctrine of *lis pendens* has no application to a case where before the institution of a suit for pre-emption, an agreement to sell the property has been executed by the vendee in favour of the prospective pre-emptor, and subsequent to the institution of the suit for pre-emption, in pursuance of the agreement a sale deed is executed and registered in favour of the subsequent purchaser. It was urged that the transfer during the pendency of the suit was in pursuance of a right to purchase the property that had been acquired on the foot of the agreement of sale executed before the date of the suit. In other words, the transfer *pendente lite* was merely an enforcement of a pre-existing right and therefore the rule of *lis pendens* could not affect it. (2) That the subsequent purchaser having a pre-emptive right in respect of the sale had exercised that right before the date of the suit by getting an agreement of sale from the vendee in his favour and having exercised his pre-emptive right by getting a contract of sale in his favour the period of limitation of one year within which a pre-emption suit could be brought by him does not affect him because his right to defeat his rival pre-emptor was still subsisting at the time when the sale deed was executed in his favour. The right of the second purchaser to buy the property being still subsisting on the date of the transfer it was contended that he could defeat the pre-emption suit on the ground that the plaintiff had no better right than himself to acquire the property. This argument was sought to be supported on the basis of the following observation that occur in the judgment of Mr. Justice Achhru Ram who delivered the Full Bench judgment in Civil Revision No. 332 of 1944¹:

[3] "The reason for not applying the rule of *lis pendens* to the case of a subsequent transferee who himself had a right of pre-emption either equal or superior to that of the plaintiff is that if he had brought a suit to enforce his pre-emptive right

1. Reported in ('46) 33 A. I. R. 1946 Lah. 142: 48 P. L. R. 28 (F.B.), Mt. Sant Kaur v. Teja Singh.

even though subsequent to the institution of the suit by the plaintiff, his right to get a decree and to acquire the property on due compliance with the terms of the decree could not be affected by the fact of the plaintiff having instituted his suit earlier, and there is no reason why he should be placed in a worse position if without the necessity of a suit the original vendee is prepared to admit his claim and to agree to his substitution for himself in the original bargain. Where the subsequent vendee has still the means of coercing by means of legal action, the original vendee into surrendering the bargain in his favour, a surrender as a result of a private treaty, and out of Court in recognition of the right to compel such surrender by means of suit cannot properly be regarded as a voluntary transfer so as to attract the application of the rule of *lis pendens*. The correct way to look at the matter, in a case of this kind, is to regard the subsequent transferee as having simply been substituted for the vendee in the original bargain of sale. He can defend the suit on all the pleas which he could have taken had the sale been initially in his own favour. However, where the subsequent transferee has lost the means of making use of the coercive machinery of the law to compel the vendee to surrender the original bargain to him, a re-transfer of the property in the former's favour cannot be looked upon as anything more than a voluntary transfer in the former's favour of such title as he had himself acquired under the original sale."

[4] As at present advised, it appears to me that the contentions of Mr. Gauba have considerable force. Mohammad Saddiq had available to him at the time when he obtained the sale deed from Mt. Khatun, the coercive machinery for acquiring the property from the vendee on the basis of the agreement of 22nd September 1941. It is no doubt true that he had lost his right to institute a pre-emption suit but that fact loses importance in view of the fact that he had already enforced that right by coercing the vendee under the threat of a pre-emption suit in executing an agreement of sale of that property in his favour. Mr. Sawhney, the learned counsel for the respondent, placed reliance on the provision of section 54, Transfer of Property Act. In that section it is laid down that a contract for the sale of immoveable property is a contract, that sale of such property shall take place on terms settled between the parties and it does not, of itself, create interest in or charge on such property. The learned counsel argued that this contract of sale, dated 22nd September 1941, did not create any interest in favour of Mohammad Saddiq in the property sold and that his interest as owner of the property came into existence only on the 11th November 1942 when the sale deed in respect of that property was registered in his favour. The learned counsel contended that in these circumstances the rule laid down by the Full Bench in Civil Revision No. 332 of 1944¹ had full appli-

cation and that the agreement taken on 22nd September 1941 did not take out the present case from the ambit of the Full Bench ruling.

[5] It appears to us that the matter is of considerable importance and is of frequent occurrence and should be authoritatively decided. We would, therefore, direct that this case be laid before His Lordship the Chief Justice for constituting a larger Bench to hear this appeal. We would like to suggest that preferably the matter should be heard by the Bench that decided Civil Revision No. 332 of 1944¹ so that the scope of that decision may be fully clarified.

Judgment of the Full Bench

[6] **Achhru Ram J.**—The facts giving rise to this reference may be briefly stated as follows. On 21st August 1941 Mt. Khatun, defendant 1, purchased a house situate in *gali Rahuji* in the city of Delhi from Zamir Ahmad, defendant 2, for a consideration of Rs. 3,000. The sale deed which was executed on 21st August 1941 was registered two days later, on 23rd August 1941. Mohammad Sadiq, defendant 3, has a house contiguous to the house in suit, and, on 30th August 1941, he served a notice on Mt. Khatun asking her to re-transfer, within a month of the receipt of the notice, the aforesaid house to him on receipt of the sale price, and informing her that in case of her default, a suit for pre-emption would be brought against her. On 19th September 1941 Ghasi Ram plaintiff, who also had got a house contiguous to the suit house, served a similar notice on Mt. Khatun in which he called upon her to re-convey the house purchased by her to him within a period of 15 days on receipt of a sum of Rs. 3,000. On 22nd September 1941, Mt. Khatun executed an agreement in favour of Mohammad Saddiq whereby she agreed to transfer the house in dispute to him for a sum of Rupees 3,050 out of which Rs. 200 were said to have been received by way of earnest money and the balance was agreed to be paid at the time of the registration of the sale deed. It was stated in the agreement that Mt. Khatun had agreed to transfer the house in recognition of Mohammad Saddiq's superior pre-emptive right. On 29th September 1941, Mt. Khatun sent reply to Ghasi Ram's notice wherein she informed him of her having executed the above mentioned agreement in favour of Mohammad Saddiq. On 22nd August 1942 Ghasi Ram brought a suit against Mt. Khatun for possession of the house by pre-emption. He impleaded only Mt. Khatun and her vendor

Zamir Ahmad as defendants 1 and 2. On 11th November 1942, Mt. Khatun sold the house to Mohammad Saddiq by execution of a properly registered sale deed. In her written statement filed in Ghasi Ram's suit she pleaded that she had nothing further to do with the house in suit which she had resold to Mohammad Saddiq. The latter was thereon impleaded as a defendant. He contested the suit on the plea that he had a right of pre-emption equal to that of the plaintiff himself. The plaintiff, while admitting Mohammad Saddiq's pre-emptive right, pleaded that there was in fact no real sale in the latter's favour; that the alleged sale was a mere paper-transaction and was never intended to transfer ownership in his favour, and that, in any case, the sale, having taken place after the expiry of the period of limitation prescribed for a pre-emption suit, and during the pendency of the plaintiff's own suit for pre-emption, was hit by the rule of *lis pendens* and could not affect the plaintiff's right to a decree. The learned Subordinate Judge held that the sale by Mt. Khatun in favour of Mohammad Saddiq was a genuine sale, and that although made after the expiry of limitation for a pre-emption suit it had been made in pursuance of agreement to sell which itself had been entered into at a time when Mohammad Saddiq's right to sue for pre-emption was still subsisting and in express recognition of such right. He was of the opinion that, under the circumstances, the rule of *lis pendens* was inapplicable, and that the plaintiff's pre-emptive right not being superior to that of Mohammad Saddiq, he was not entitled to succeed. In this view of the case, the plaintiff's suit was dismissed. On appeal the learned Additional District Judge of Delhi held the rule of *lis pendens* to be applicable to the sale in Mohammad Saddiq's favour and, allowing the plaintiff's appeal, decreed his claim. Mohammad Saddiq came up in second appeal to this Court. The appeal was heard by a Division Bench. It was contended by the learned counsel for the appellant before the Bench that the doctrine of *lis pendens* could have no application to a case where before the institution of the suit for pre-emption, an agreement to sell the property had been executed by the vendee in favour of another prospective pre-emptor with an equal right of pre-emption, and, subsequent to the institution of the suit, in pursuance of the agreement, a sale deed had been executed and registered in the latter's favour, after the expiry of limitation for a suit to enforce his own pre-emptive right. In

support of this contention, reliance was placed on certain observations in the judgment of the Full Bench in Civil Rev. No. 332 of 1944¹ (since reported in 48 P.L.R. 28). Considering the matter to be of importance, the Division Bench decided to refer the case to a Full Bench.

[7] After hearing the learned counsel for the parties, I am inclined to the opinion that the sale in the appellant's favour, although made in performance of an agreement entered into at a time when his right to sue for pre-emption was still subsisting and in express recognition of such right, is hit by the doctrine of *lis pendens* and cannot be allowed to defeat the plaintiff's suit. With all respect to my brother Mahajan, who appears in his order of reference to take a contrary view, I find myself unable to accept the contention that by securing the agreement dated 22nd September 1941 in his favour the appellant can be deemed to have enforced his pre-emptive right. It is quite true that, in the notice served by him on Mt. Khatun he asserted his superior right as against her and actually threatened to take steps to enforce that right by means of an action unless she agreed to his exercise of the right, out of Court by surrendering the house to him on receipt of the full price. It is also true that she admitted the correctness of his assertion and formally agreed to convey the property to him by means of a proper sale deed. However the whole transaction fell far short of an actual exercise of enforcement of the pre-emptive right. A right of pre-emption can be said to have been effectively exercised or enforced only when the pre-emptor has become actually substituted for the vendee in the original bargain of sale. Till such substitution takes place the vendee remains the owner of the property purchased by him and the prospective pre-emptor cannot claim to have any right to or in the subject-matter of the sale. Where the pre-emptive right is sought to be enforced by means of a suit, such substitution takes place, and the pre-emptive right is deemed to have been exercised or enforced, only when the price has been paid by the pre-emptor into Court in compliance with the decree passed in his favour. Till such payment has been made, the act of the pre-emptor in instituting the suit for pre-emption amounts to no more than a mere assertion of the right, which becomes a successful assertion of the right when the suit culminates in a decree. There is however a vast difference between a mere assertion, albeit a successful assertion, of the

pre-emptive right and the exercise or enforcement of that right. Mahmood J. in 12 All. 234² went to the extent of holding that the enforcement of pre-emption is not deemed to have taken place unless, by virtue of his pre-emption, the pre-emptor has obtained possession of the pre-emptional tenement, either under a voluntary surrender thereof by the buyer, or under a decree. In our province, however, being put in possession of the pre-emptional tenement has never been insisted upon as an essential pre-requisite of the enforcement of the pre-emptive right, and it has been considered enough for the divestiture of the vendee's title and the vesting of the title in the pre-emptor, which by common consent the enforcement of a pre-emptive right necessarily pre-supposes, that the pre-emptor has duly deposited in Court the price as required by the decree. The form of the decree in a pre-emption suit, as prescribed in O. 20, R. 14, Civil P. C., itself clearly shows that till such deposit is made the pre-emptive right cannot be said to have been enforced, because in case of the failure of the plaintiff to make the deposit in strict compliance with the terms of the decree, his suit is to stand dismissed. It is therefore not necessary to refer to the decided cases dealing with this matter. However, the following observations of Sir Meredith Plowden in his judgment in 136 P.R. 1894³ may be quoted with advantage :

[8] "A right to the offer of a thing about to be sold is not identical with a right to the thing itself, and that is the primary right of the pre-emptor. The secondary right is to follow the thing sold without a proper offer to the pre-emptor, and to acquire it if he thinks fit in spite of the sale made in disregard of his preferential right. But even a decree in suit brought for the purpose of enforcing this secondary right does not give the pre-emptor a right to the thing sold. He does not acquire that right until he had paid the price fixed in the decree within the prescribed period, and this he need not do unless he chooses. If he does so, the right, title and interest of the vendor which had meantime vested in the vendee is divested and vests in the pre-emptor and then, and not till then, he has a right to the land itself."

[9] Similar observations are to be found in the judgment of Rattigan J. in 94 P. R. 1902.⁴ The matter is clinched by the following observations in the judgment of my brother Din Mohammad in the Full Bench case in I. L. R. 1942 Lah. 155⁵ :

2. ('90) 12 All. 234 (F.B.), Deokinandan v. Sri Ram.
3. ('34) 136 P. R. 1894, Dhani Nath v. Budhu.
4. ('02) 94 P. R. 1902, Lashkari Mal v. Ishar Singh.
5. ('41) 28 A. I. R. 1941 Lah. 433 : I.L.R. (1942) Lah. 155 : 197 I. C. 227 (F.B.), Madho Singh v. James R. R. Skinner.

[10] "In my view, the right of pre-emption does not exist independently of its exercise so as to invalidate transactions which take place in defiance of it. It is no doubt a right of preferential purchase but so long as it is held in abeyance, it is ineffective altogether. In fact, under O. 20, R. 14, Civil P. C., a claim to pre-emption, if decreed, becomes effective only when the money is paid into Court and, as laid down by their Lordships of the Privy Council in 44 Cal. 675⁶ the vendee is entitled to the rents and profits so long as the purchase-money is not paid."

[11] Where the pre-emptive right is sought to be enforced not by means of a suit but by means of a private treaty out of Court, the substitution of the pre-emptor for the purchaser takes place and the pre-emptive right can be said to have been exercised or enforced, when the price is either paid or tendered to the purchaser and he has actually surrendered the bargain in favour of the pre-emptor. There can be no enforcement of the pre-emptive right except by complete divestiture of the vendee's title and the vesting of such title in the pre-emptor. Generally, the vendee will not agree to surrender his title under the sale in favour of the pre-emptor except on payment by the latter of the price paid by him to the vendor. However, the possibility of the vendee agreeing to surrender the bargain without insisting on immediate payment of the sale price cannot be excluded and therefore there may be cases—of course such cases will be few and far between—in which the right of pre-emption may be effectively exercised even without paying or tendering the price though the following observations in 3 S. D.A.N.W.P. 171⁷ at p. 176 would seem to show that the tender of the sale price is a condition precedent for the exercise of such right :

[12] "We, however, are disposed to consider the latter view as the more correct, as the pre-emptor could have no preferential right till he had tendered the full price."

[13] In spite of the agreement executed in the appellant's favour by the original purchaser on 22nd September 1941, the said purchaser remained the owner of the house and there was no substitution of Mohammad Saddiq in the bargain of sale. In fact, there was no substitution in this case even on 11th November 1942 when the property was actually conveyed to the appellant and the sale price was paid by him because by that time the appellant had no subsisting right

6. ('16) 3 A. I. R. 1916 P. C. 179 : 44 Cal. 675 : 44 I. A. 80 : 39 I. C. 958 (P. C.), Deonandhan Prashed Singh v. Ramdhari Chowdhri.
7. (1865) 3 S. D. A. N. W. P. 171, Rai Manick Chand v. Baboo Rameshwar Rae.

left to claim his own substitution in the original bargain. The sale in his favour was only a conveyance of Mt. Khatun's own title to the house in pursuance of the agreement to sale made by her, and it could make no difference to the incidents of this conveyance whether the agreement to sale had been made on account of the appellant having the power, at the time it was made, to displace Mt. Khatun from the ownership of the house by enforcing his right of pre-emption or otherwise. The purchase of the house by the appellant cannot be regarded as a purchase in exercise or enforcement of a superior pre-emptive right which right had in fact become unenforceable long before the purchase. It does not, therefore, fall within the category of transfers which according to the judgment of the Full Bench in 48 P. L. R. 28¹ are excepted from the operation of the doctrine of *lis pendens* and that doctrine fully applies to it. It appears to have been urged before the Division Bench which has referred this case to a Full Bench, — it was certainly urged before us — that the sale in the appellant's favour having been made at a time when, though he had no subsisting right to sue for pre-emption, he had still the means of coercing Mt. Khatun, by instituting a suit for specific performance of the agreement executed by her, to transfer the house in his favour, could not be regarded as a voluntary transfer so as to attract the application of the doctrine of *lis pendens*. Support for this contention was sought from the following passage in the Full Bench judgment:

[14] "The reason for not applying the rule of *lis pendens* to the case of a subsequent transferee who himself had a right of pre-emption either equal or superior to that of the plaintiff is that if he had brought a suit to enforce his pre-emptive right, even though subsequent to the institution of the suits by the plaintiff, his right to get a decree and to acquire the property on due compliance with the terms of the decree could not be affected by the fact of the plaintiff having instituted his suit earlier, and there is no reason why he should be placed in a worse position if without the necessity of a suit the original vendee is prepared to admit his claim and to agree to his substitution for himself in the original bargain. Where the subsequent vendee has still the means of coercing, by means of legal action, the original vendee into surrendering the bargain in his favour, a surrender as a result of a private treaty, and out of Court in recognition of the right to compel such surrender by means of a suit cannot properly be regarded as a voluntary transfer so as to attract the application of the rule of *lis pendens*. The correct way to look at the matter, in a case of this kind, is to regard the subsequent transferee as having simply been substituted for the vendee in the original bargain of sale. He can defend the suit on all the pleas which he

could have taken had the sale been initially in his own favour. However where the subsequent transferee has lost the means of making use of the coercive machinery of the law to compel the vendee to surrender the original bargain to him, retransfer of the property in the former's favour cannot be looked upon as anything more than a voluntary transfer in the former's favour of such title as he had himself acquired under the original sale."

[15] I, however, fail to see how the appellant can derive any assistance from this passage. As the context clearly shows, the expression "legal action" in the above passage, has reference only to the action for the enforcement of the pre-emptive right and the words "the coercive machinery of the law" connote only the machinery which is set in motion by the institution of such an action. In order to save a transfer from the operation of the rule of *lis pendens*, the "legal action" which the subsequent vendee, at the time of the sale in his favour, has the right to maintain must be an action by which he can compel the original vendee to surrender the bargain in his favour, and "the coercive machinery of the law" which is available to him at that time must be a machinery which can substitute him for the first vendee in the original bargain of purchase. If he had, when the transfer in his favour took place, a subsisting right to maintain such an action and to set such coercive machinery of the law in motion, his position is not worsened if he is able to induce the first vendee to surrender the bargain in his favour without his bringing the action and setting the machinery of law in motion. However if the "legal action" which he has the right to maintain, and "the coercive machinery of the law" of which he can avail himself cannot achieve this, the mere circumstance that they can enable him, in the circumstances to wrest the property from the first vendee cannot affect the application of the doctrine of *lis pendens*. It is not every transfer *pendente lite* which is made under threat of legal proceedings, or in enforcement of a pre-existing legal right, or in performance of a pre-existing legal obligation, or which can otherwise be regarded as an involuntary transfer, that is excepted from the operation of that doctrine. I may note that the words "cannot properly be regarded as a voluntary transfer so as to attract the application of the rule of *lis pendens*" in the judgment of the Full Bench have been used merely to describe the nature of the transfer that was being spoken of and should not be taken to confine the operation of the doctrine of *lis pendens* merely to voluntary transfers. The rule of *lis pendens* applies equally to volun-

tary and involuntary transfers otherwise falling within its ambit. In spite of the express exclusion of execution sales from the operation of the Transfer of Property Act the rule has been held applicable, on general principles, to such sales even in provinces where that Act is in force, although section 52 of the Act giving statutory recognition to the rule cannot govern those sales.

[16] Mr. Gandhi, relying on the judgment in A.I.R. 1930 Lah. 131⁸ contended that the agreement dated 22nd September 1942 had the effect of transferring immediately at least the equitable title in the suit-house to Mohammad Saddiq and that the latter could resist the plaintiff's suit for pre-emption on the strength of such equitable title, even though the subsequently acquired legal title could not avail him for the purpose. At the time the agreement of 22nd September 1941 was executed, S. 54, Transfer of Property Act, was in force in the locality in which the house which was the subject-matter of agreement, was situate. By notification No. F. 844/36 dated 15th January 1937, the provisions of Ss. 54, 107 and 128, T. P. Act, were extended to the following areas in the province of Delhi: (a) Area within the jurisdiction of the Delhi Municipal Committee. (b) Area within the jurisdiction of the New Delhi Municipal Committee. (c) Area within jurisdiction of the Notified Area Committee, Civil Lines. (d) Area within the jurisdiction of the Notified Area Committee, Fort. It is not disputed that the suit house is situate within the jurisdiction of the Delhi Municipal Committee. The concluding para. of S. 54, Transfer of Property Act, runs as follows:

[17] "A contract for the sale of immovable property is a contract that a sale of such property shall take place on terms settled between the parties. It does not, of itself, create any interest in or charge on such property."

[18] This paragraph makes a departure from the English law under which the purchaser, by virtue of the contract of sale, becomes in equity the owner of the property from the date of the contract. The principle of English law has been expressly held by the Privy Council in 44 Cal. 542⁹ to be inapplicable to places where the Transfer of Property Act is in force. It does not necessarily mean that the distinction between a legal and an equitable estate is recognized in places where the Act is not in force. In fact there is abundant authority that this dis-

8. ('30) 17 A. I. R. 1930 Lah. 131 : 120 I. C. 538, Tomlinson v. W. F. Harding.
9. ('16) 3 A. I. R. 1916 P. C. 139 : 44 Cal. 542 : 44 I. A. 15 : 38 I. C. 938 (P. C.), Maung Shwe Goh v. Maung Inn.

inction has never been recognized in this country. Reference may in this connection be made to the judgments of their Lordships of the Judicial Committee in 9 Beng. L.R. 377,¹⁰ 31 Cal. 57¹¹ and 10 Pat. 851.¹² In 31 Cal. 57¹¹ their Lordships made the following observations:

[19] "The law of India, speaking broadly, knows nothing of the distinction between legal and equitable property in the sense in which that was understood when equity was administered by the Court of Chancery in England."

[20] In the judgment in the Patna case¹³ the following observations are to be found:

[21] "The Indian law does not recognize legal and equitable estates. By that law, therefore, there can be but one owner and where the property is vested in a trustee, the owner must, their Lordships think, be the trustee."

[22] In I. L. R. 1942 Lah. 79,¹³ Beckett J. in delivering the judgment of a Full Bench of this Court said:

[23] "In England the purchaser under a contract of sale is sometimes described as the equitable owner of the land, though only against any other party to the contract. In India, however, the law recognizes no distinction between legal and equitable estates in this sense."

[24] Even the judgment in A.I.R. 1930 Lah. 131⁸ does not lay down any contrary rule. It is true that the seller in that case was regarded as a trustee of the property for the purchaser till the actual completion of the sale, and similarly the purchaser was held to be a trustee for the seller of the sale price till that time. The word "trust" appears to have been used for the purpose of making an equitable adjustment of the respective claims of the parties. In place of rent claimed by the seller from the purchaser, who, prior to the execution of the agreement for sale, was in occupation of the premises as a tenant under the seller, for the period between the date of the agreement and date of the actual sale, decree was passed in his favour not for the rent for that period at the stipulated rate but for interest on the sale price for the same period. Even if the seller is to be regarded as a trustee for the purchaser of the property the former has contracted to sell to the latter, during the period intervening between the execution of the agree-

10. ('72) 9 Beng. L. R. 377 : I. A. Sup. Vol. 47 : 2 Suther. 692 : 3 Sar 82 (P. C.), Jatindra Mohan Tagore v. Ganendra Mohan Tagore.

11. ('04) 31 Cal. 57 : 30 I. A. 238 : 8 Sar 554 (P. C.), Webb v. Macpherson.

12. ('31) 18 A.I.R. 1931 P. C. 196 : 10 Pat. 851 : 58 I. A. 279 : 133 I. C. 705 (P. C.), Chhatra Kumari Devi v. Mohan Bikram Shah.

13. ('41) 28 A.I.R. 1941 Lah. 407 : I.L.R. (1942) Lah. 79 : 197 I. C. 282 (F. B.), Mt. Shankri v. Milkha Singh.

ment to sell and the completion of the sale, it cannot be said that the purchaser becomes the equitable owner of the property with effect from the date of the agreement, because in case of a trust in this country the entire title vests in the trustee and it has never been held that the equitable title in the subject-matter of the trust vests in the *cestui que trust*. Be that as it may, in this case Mohammad Sadiq, by reason of the express provisions of S. 54, T. P. Act, could not claim to have acquired any equitable title to the house on 22nd September 1941 by virtue of the contract for sale made between him and Mt. Khatun, and accordingly it does not become necessary for us to decide whether the plaintiff's suit could be successfully resisted by him on the strength of any equitable title.

[25] For the reasons given above, I am of the opinion that the plaintiff's suit has been rightly decreed by the learned District Judge and would dismiss this appeal. In view, however, of the circumstances of the case I would leave the parties to bear their own costs throughout.

[26] **Din Mohammad J.** — I agree that the appeal be dismissed, leaving the parties to bear their own costs throughout.

[27] **Teja Singh J.** — So do I.

G.B./D.H. *Appeal dismissed.*

[Case No 64.]

A. I. R. (33) 1946 Lahore 329

FULL BENCH

SALE, MUNIR AND KHOSLA JJ.

Emperor

v.

Shanti Narain Manocha—Respondent.

Civil Misc. Case No. 285 of 1944, Decided on 1st April 1946.

Legal Practitioners Act (1879), S. 13—Professional misconduct—Pleader drafting plaint for plaintiff gratuitously as friend — No confidential information imparted by plaintiff—Pleader subsequently accepting brief for defendant and appearing for him is not guilty of professional misconduct.

In a suit for redemption of a mortgage, a pleader drew up a draft plaint at the plaintiff's request gratuitously and as a friend. For this purpose the only document he was shown was the mortgage deed. No confidential information was imparted to him by the plaintiff. The plaint was filed by the plaintiff himself. The pleader subsequently accepted brief for defendant and appeared for him :

Held that as no confidential information was imparted to the pleader by the plaintiff there was no breach of confidence on the part of the pleader in appearing for the defendant at a later stage and he was not guilty of professional misconduct.

[P 330 C 1,2]

Basant Krishan Khanna, Advocate-General — for the Crown.

Arjan Dev Bagai — for Respondent.

ORDER.*—Lala Shanti Narain, Pleader of Dera Gazi Khan has appeared before us to answer a charge of professional misconduct framed by a Division Bench on 11th December 1944. The proceedings were initiated by a petition dated 11th January 1944, submitted by Mohammad Ali in which it was alleged that Lala Shanti Narain, having been retained by him to draft a petition in a redemption suit as well as to issue a registered notice on payment of a fee of Rs. 20 appeared for the opposite party during the hearing of the case. Lala Shanti Narain was called upon to submit an explanation and while admitting some of the facts denied the essential fact of retainer by Mohammad Ali. The learned Advocate-General framed a charge covering all these facts but was directed by the Division Bench to re-frame a charge which now reads as follows:

[2] "That you have been guilty of professional misconduct inasmuch as after consultation with Munshi Mohammad Ali for the institution of a suit for redemption of a mortgaged house, you prepared a rough draft of the plaint in your own hand in case of *Munshi Muhammad Ali v. Lala Shankar Dass*, etc., but subsequently you accepted brief for the defendants and appeared in Court as their counsel.

[3] The above facts constitute a reasonable cause for your removal or suspension under the Legal Practitioners Act."

[4] The proceedings before the Full Bench are governed by Rules 9 and 10 of the statutory rules framed by the High Court under the Legal Practitioners Act and printed in ch. 6-G, vol. V of the High Court Rules and Orders. After hearing counsel today we find that some of the essential facts are in controversy and that it will be necessary to hear witnesses on both sides. Rule 10 of the relevant rules empowers us to decide what witnesses shall be examined and to nominate one of our members to record any evidence which may be admitted. We accordingly nominate the Judge in charge of the administration (who is one of the Bench) to record the evidence of all such witnesses as may be produced either by the pleader or by the petitioner (the case for whom will be conducted by the learned Advocate-General). We direct that the case should be laid before the administration Judge on Monday the 19th instant and that counsel should appear before the Judge on that date in connection with filing a list of witnesses and securing a date for the recording of the evidence. The

*Dated 13th February 1945 by Sale, Munir and Marten JJ.

administration Judge after recording the evidence will submit the record to the Full Bench before whom a date will be fixed for the decision of the case. In view of the fact that the charge has been reframed in a modified form by order of the Division Bench before whom this case first came, it has been urged on behalf of Lala Shanti Narain that the question of the retainer by Mohammad Ali of Lala Shanti Narain on a fee, has been ruled out and that no evidence should be admitted on this point. The admissibility of evidence on this point will ultimately be for the Full Bench hearing the case to decide. For the present we direct that the administration Judge, who has been nominated by us to record the evidence, shall have a discretion to record such evidence as he thinks admissible, subject to final orders on the admissibility of any evidence to which the respondent may object, being passed by the Full Bench. As directed the case will now be laid before the administration Judge on the 19th instant.

[5] **Judgment.** — The facts relevant to these disciplinary proceedings against Lala Shanti Narain, Pleader of Dera Ghazi Khan, have been stated in our order of 13th February 1945, which should be read as part of this judgment. As directed in an *interim* order of the Full Bench dated 8th October 1945, further attempts were made to effect service on the complainant. Though personally served he has not entered an appearance, nor made any attempt to substantiate his complaint. The only evidence on the record is the statement of Lala Shanti Narain, respondent. According to this statement, he was not retained by the complainant, but acting gratuitously as a friend, he drew up a draft plaint at the complainant's request in a suit for redemption of a mortgage, the plaint ultimately being filed by the complainant himself. For this purpose, according to Lala Shanti Narain, the only document which he was shown was the mortgage deed and he states that he was given no additional information of any sort by the complainant and so had no confidential information to impart, when at a later stage, he appeared for the defendants against the complainant. It is unnecessary to consider whether Lala Shanti Narain had technically been retained by the complainant in the first instance. We must accept his statement, which stands unrebutted, that, whether retained or not, no confidential information was imparted to him by the complainant, or passed on by him later to the op-

posite party. In these circumstances, there could have been no breach of confidence on the part of Lala Shanti Narain in appearing for the defendants at a later stage and, therefore, he has not been guilty of professional misconduct. We therefore discharge the rule but leave the parties to bear their own costs, inasmuch as we consider that there was a case which Lala Shanti Narain was justifiably called on to explain and the explanation has for him been rendered the easier, by the failure of the complainant to prosecute his case.

[6] It was finally suggested by Mr. Arjan Dev on behalf of the respondent that this Court should frame a rule of the nature referred to in the Madras judgment, 25 I. C. 712,¹ which provides for the circumstances under which a legal practitioner may change sides without incurring the risk of being charged with professional misconduct. This is not a matter for this Full Bench to consider. The respondent should represent the matter to his Bar Association for consideration.

G.B./D.H.

Rule discharged.

1. ('15) 2 A. I. R. 1915 Mad. 552 : 25 I. C. 712, Atchuta Ramiah v. Secretary of State.

[Case No. 65.]

A. I. R. (33) 1946 Lahore 330

FULL BENCH

DIN MOHAMMAD, ABDUR RAHMAN
AND MUHAMMAD SHARIF JJ.

Mt. Gindori — Plaintiff — Appellant
v.

Sham Lal and another — Defendants
— Respondents.

Letters Patent Appeal No. 8 of 1945, Decided on 3rd April 1946, from order of Abdul Rashid Ag. C. J. and Achhru Ram J., D/- 1st November 1945.

(a) Civil P. C. (1908), S. 11 — Suit by G against D, permanent tenant, for declaration that G was owner of demised property and D was merely a tenant — Suit decreed — Property transferred by D to S during pendency of suit — Decision held binding on S who could not re-agitate question as to tenancy in subsequent suit for ejectment brought against him.

G, a Hindu widow, brought a suit for possession of a certain house gifted to her husband against J her husband's brother. A compromise decree passed in the suit provided that G was to have a life interest in the house without any power of alienation and that J was to be in occupation of the house as permanent tenant on payment of certain monthly rent. J subsequently mortgaged the house to D who obtained possession of the house in execution of his mortgage decree. G then brought a suit against D for a declaration that she was the owner of the house and that D

was merely a tenant and also for arrears of rent. The suit was decreed in favour of *G* and the decree was confirmed finally by the High Court. During the pendency of this suit, *D* had sold the property to *S* who claimed to be the owner of the property repudiating his character as tenant. Consequently, *G* filed a suit for ejectment against *S*. The question was whether the previous judgment between *G* and *D* as to the relationship of landlord and tenant was binding on *S*:

Held that as the sale to *S* had taken place during the pendency of the suit instituted by *G* against *D*, *S* who stood in the shoes of *D*, was bound by the decision given in that suit. *S* could not, therefore, re-agitate the question as to the nature of relationship existing between the parties. [P 334 C 1]

C. P. C. —

('44) Chitaley, S. 11, N. 54, Pt. 1.

('41) Mulla, S. 11, P. 66, Pt. (m).

(b) Lease — Forfeiture — Permanent lease of house property situate in Delhi Province—S. 111 (g), T. P. Act, does not apply—Disclaimer of landlord's title unless it be by matter of record will not incur forfeiture — Repudiation of landlord's title contained in reply to notice of demand for rent—No forfeiture.

In case of leases to which the provisions of Transfer of Property Act do not apply, a disclaimer of landlord's title unless it is in a judicial proceeding or other public document, which is covered by the term 'record' in English law, is not enough to work a forfeiture. Consequently, where a transferee from a permanent lessee of house property situate in Delhi Province to which S. 111 (g), T. P. Act, is not applicable, repudiated his landlord's title to the property in reply to a notice of demand for rent:

Held that there was no forfeiture of the lease: ('19) 6 A. I. R. 1919 P. C. 1, *Expl. and Applied*; *Case law discussed*. [P 337 C 2]

T. P. Act —

('45) Chitaley, S. 111, Notes 14 and 25.

('36) Mulla, S. 111, Page 645 Note 'Disclaimer.'

(c) Transfer of Property Act (1882), S. 112 — Principle of section applies to Punjab and Delhi—Institution of suit for rent after a suit for ejectment of lessee — No waiver (*obiter*).

The principles laid down in S. 112, T. P. Act, with regard to waiver of forfeiture are applicable to the Punjab and Delhi province as being in consonant with justice, equity and good conscience. [P 338 C 1]

Where after the institution of a suit for ejectment of the lessee on the ground of forfeiture the lessor brought a suit for rent which had become due since the forfeiture:

Held that there was no waiver of forfeiture which had once been incurred: (1872) 7 Q.B. 344; (1920) 2 K. B. 315; ('31) 18 A.I.R. 1931 Pat. 240; 34 Mad. 161 and 15 I. C. 445 (Mad.), *Ref.* [P 338 C 1]

T. P. Act —

('45) Chitaley, S. 112, Notes 1 and 7.

('36) Mulla, S. 112, Page 652 Note 'Second Proviso—Election irrevocable.'

(d) Lease — Forfeiture for denial of landlord's title—No relief can be granted—T. P. Act (1882), S. 114A.

There is no provision in the Transfer of Property Act for granting relief against forfeiture

for denial of landlord's title: ('43) 30 A. I. R. 1943 All. 279 and ('19) 6 A. I. R. 1919 Mad. 1106, *Ref.* [P 338 C 1]

T. P. Act —

('45) Chitaley, S. 114A, N. 1 Pts. 4 and 5a.

('36) Mulla, S. 114A Page 657 Pt. (c).

Bishan Narain—for Appellant.

Harish Chander and Shamsheer Bahadur — for Respondents.

ORDER OF REFERENCE

Abdul Rashid Ag. C. J. and Achhru Ram J. — The learned single Judge has held that a tenant may forfeit his holding by denial of his landlord's title, but the denial must be by matter of record. If the denial is clear and unmistakable, but it is only made by means of notices or correspondence, the holding of the tenant cannot be forfeited as the denial is not by a matter of record. In coming to this conclusion, the learned Judge has relied upon the decision of their Lordships of the Privy Council in 42 Mad. 589¹ where it was held that the rule of English law is that a tenant will forfeit his holding if he denies his landlord's title in clear, unmistakable terms, whether by matter of record, or by certain matters *in pais*. It was further held that the cases to which the Transfer of Property Act is not specifically applicable will be governed by rules based on equity, justice and good conscience as understood in the English Common Law. The ruling of their Lordships of the Privy Council was discussed at great length by a Division Bench of the Bombay High Court in 59 Bom. 194.² It was held in that case that according to the Privy Council decision there can be no forfeiture by disclaimer of landlord's title, in cases not covered by the Transfer of Property Act, unless the disclaimer is by matter of record. We are not satisfied whether this interpretation of the Privy Council's decision is a sound one. The observations of their Lordships do not necessarily show that the only matters by which a tenancy can be forfeited is by denial of title, by matter of record or by certain matters *in pais*. Ordinarily, a tenancy would be forfeited by disclaimer, by matter of record and by certain matters *in pais*, but are these methods exhaustive of the manner in which a forfeiture of the holding can be incurred? This is an important question which requires authoritative deci-

1. ('19) 6 A. I. R. 1919 P. C. 1: 42 Mad. 589: 46 I. A. 109: 50 I. C. 631 (P. C.), *Maharaja of Jey-pore v. Rukmini Pattamahadevi Garu*.
2. ('35) 22 A.I.R. 1935 Bom. 41: 59 Bom. 194: 155 I. C. 516, *Rachotappa Ishvarappa v. Konhar Annarao*.

sion by a larger Bench. We, therefore, refer this case to a larger Bench for decision.

Judgment of the Full Bench

[2] **Din Mohammad J.** — This is an appeal under cl. 10, Letters Patent from a judgment of Beckett J. which reversed the decision of the Courts below and dismissed the plaintiff's suit. The facts involved in this appeal are these. One Zora Singh had two sons, Bhey Ram and Jamna Das. Bhey Ram was married to Mt. Gindory. On 6th April 1905, Zora Singh gifted a house, which is now in dispute, to Bhey Ram. Both the donor and the donee died some time before 1916. On 5th January 1916, Mt. Gindory filed a suit against her husband's brother Jamna Das for possession of a roof, *Chaubara* and a room, and this was decreed on 10th November 1916 but subject to payment of some compensation to the defendant. From this decree, Mt. Gindory preferred an appeal which came on for hearing before the Additional District Judge, Mr. Clifford, on 6th January 1917 and was compromised. This compromise was later amended to some extent on 13th February 1917. By virtue of this compromise Mt. Gindory was declared "to have the life interest in the house gifted to her husband by deed dated 6th April 1905 without any power of alienation whatever, whether for necessity or otherwise." The defendant, however, was to remain in occupation of the house "as a permanent tenant paying Rs. 5 per mensem plus rupees 3-8-0 per mensem, total Rs. 8-8-0 per mensem to the plaintiff," and this sum was to be remitted to her by money order. If not paid, she was authorised to recover the same by suit. On remarriage the plaintiff was to lose all interest in this property.

[3] On 28th February 1930, Jamna Das mortgaged this property to one Jai Narain. Later a suit on the foot of that mortgage was instituted by the mortgagee against the mortgagor and a preliminary decree was passed therein on 9th December 1932 and this was made final on 31st July 1933. The property in question was put to auction in execution of the mortgage decree and was on 15th January 1938 purchased by Jai Narain's adopted son, Durga Parshad, who in the meantime had been brought on the record as his legal representative, and he entered into possession thereof on 28th October 1938. Mussammat Gindori raised certain objections but they did not fructify. On 31st August 1939, she brought a suit against Durga Parshad for a declaration that

she was the owner of the house in dispute so long as she lived and that the defendant was merely a tenant. She further claimed Rs. 229 8-0 as arrears of rent and also prayed for an injunction restraining the defendant from alienating the property in any manner. On 8th April 1940, this suit was decreed in the following terms:

(4) "A decree declaring that the plaintiff has a life interest in the property in suit which was gifted to her husband Bhey Ram by his father Rura Mal (sic) by means of the deed of gift dated 6th April 1905 without any power of alienation whatever whether for necessity or otherwise and that the defendant became a tenant under her from 28th October 1938 till the date on which he sold his rights to Sham Lal etc. is passed in plaintiff's favour against the defendant. So also a decree for Rs. 77/2/6 as arrears of rent is passed in plaintiff's favour against the defendant."

[5] It may be observed that during the trial it transpired that on the date when the suit was instituted Durga Parshad had sold this property to one Sham Lal and his wife, and the Subordinate Judge holding that the sale had already taken place during the pendency of the suit dismissed it so far as the prayer for injunction was concerned. An appeal against the decree of the Subordinate Judge was taken by Durga Parshad to the Court of the District Judge who, however, maintained it on 5th May 1941 with this modification only that the rent was reduced from Rs. 8-8-0 to Rs. 5 per mensem. A second appeal was preferred to this Court by Mt. Gindori and on 24th March 1942 Abdul Rashid J. allowed the appeal and restored the order of the Court below as regards the amount payable to her declaring it to be rent and not monthly allowance as contended by Durga Parshad.

[6] After the decision of Durga Parshad's appeal by the District Judge, Mt. Gindori on 23rd August 1941, sent a notice through counsel to Sham Lal and his wife demanding rent from them as tenants. On 23rd August 1941 both of them replied through a counsel denying the correctness of the contents of the notice and their character as tenants. On 16th February 1942, Mt. Gindori sent a fresh notice to them to quit as she no longer intended to keep them as her tenants. In the reply given by them on 20th February 1942 they claimed to be the owners of the house, thus repudiating the title of Mt. Gindori. Consequently, on 4th March 1943 the suit out of which this appeal has arisen was instituted by Mt. Gindori against Sham Lal and his wife for ejectment. In the written statement filed by them they adhered to their denial of the plaintiff's title and on

17th July 1942 necessary issues arising from the pleadings of the parties were raised. They read as follows:

[6a] (1) Whether the defendants are the tenants of the house in dispute under plaintiff and if so, on what terms? (2) Whether a valid notice of ejectment has been given by the plaintiff to the defendants? If not, what is its effect? (3) Whether the plaintiff is estopped from bringing the present suit under S. 41, T. P. Act? (4) Whether the decisions in the previous litigation between the plaintiff and the predecessor-in-title of the defendants as alleged in paras. 3 and 6 of the plaint operate as *res judicata* in this case and what is their effect? (5) Relief.

[7] Issues 1 and 4 were discussed together by the Subordinate Judge and he came to the conclusion that the previous judgments were binding on the defendants and that they were the permanent tenants of the house under the plaintiff liable to pay rent at the rate of Rs. 8 8.0 per mensem. On issue 2 he remarked that the question of the validity of notice did not arise at all inasmuch as both Durga Parshad and his transferees had persistently denied the title of the plaintiff to the property in suit as well as their liability to pay rent. In these circumstances, no notice was required to be given to them and consequently the notice of ejectment issued by the plaintiff was quite valid. On issue 3, no arguments appear to have been addressed by the defendants' counsel and the Subordinate Judge remarking that he could not understand how section 41 applied to this case, decided this issue against them. While discussing the issue of relief he considered the possible effect of the denial of the plaintiff's title by the defendants and the setting up of an adverse title in themselves, and observed that such declaration on the part of the tenants worked a forfeiture of the tenancy. He further remarked that on the date when the case was argued his attention was drawn to a suit instituted by the plaintiff for recovery of rent from Durga Parshad payable from 1st August 1938 to 30th November 1942 and it was urged that inasmuch as the plaintiff had treated the tenancy as subsisting till then, no forfeiture could accrue. To this, counsel for the plaintiff replied that the suit so far as it related to the rent from 20th February 1942 to 30th November 1942 had been withdrawn. The Subordinate Judge, however, observed that the claim for rent involved in the suit had no effect whatever on the forfeiture that had already worked, and, on the grounds set forth above, he made a

decree with costs as prayed in favour of the plaintiff.

[8] From this decision an appeal was preferred to the Senior Subordinate Judge. He too agreed with the trial Judge so far as the questions of relationship between the parties and the forfeiture were concerned. Towards the close of the arguments, however, it was urged before him that the appellants were prepared to abide by the terms of the compromise effected between Mt. Gindori and Jamna Das and consequently they should be relieved against forfeiture. Observing that this belated repentance of the defendants "could not put an end to the right which accrued to the plaintiff on that cause of action," he dismissed the appeal with costs.

[9] The unsuccessful defendants then preferred an appeal to this Court which was heard by Beckett J. It appears from the judgment delivered by him that counsel for the appellants confined himself to two points only: (1) that the relationship was not really a tenancy at all but a family arrangement designed to secure maintenance for the widow, and (2) that no forfeiture could work in the present circumstances. On the first question, the learned Judge observed that the arrangement would have to be treated as a lease which it purported to be. Agreeing with the defendants' contention on the second question, however, he allowed the appeal but left the parties to bear their own costs throughout. He, at the same time, certified the case to be a fit one for Letters Patent appeal. This appeal was accordingly instituted and heard in the first instance by Abdul Rashid and Achhru Ram JJ. They were not inclined to accept the view advanced by Beckett J. as regards the question of forfeiture but, in view of the importance of the question involved, referred the appeal to a larger Bench. This is why this appeal has been placed before this Bench for disposal.

[10] The questions that arise for decision in this appeal are: (1) Whether the respondents are bound by the previous judgments between the parties on the question of the nature of relationship existing between them? (2) If not whether the compromise effected between Mt. Gindori and Jamna Das did not amount to lease but only to a family arrangement with a view to provide for her maintenance? (3) If the position of the defendants was that of tenants, whether forfeiture had worked on account of the disclaimer of the plaintiff's title? (4) If so, whether there has been

a waiver of forfeiture on account of a suit having been instituted by the plaintiff claiming rent from the period subsequent to the forfeiture? (5) If forfeiture had accrued whether the defendants were entitled to be relieved against it?

[11] The first question is simple and must be replied in the affirmative and this being so, the second question does not arise. It is conceded that if the sale in favour of Sham Lal and his wife had taken place during the pendency of the suit instituted by the plaintiff against Durga Parshad on 31st August 1939, they would be bound by the decision given in that suit. As stated above, it was clearly found in that suit that that sale had taken place during the pendency of the suit and this decision is binding on the respondents. Further, in the appeal disposed of by Abdul Rashid J. a definite finding was given to the effect that the sum agreed to be paid by Jamna Das was by way of rent and not by way of maintenance. This being so, both Sham Lal and his wife who stand in the shoes of Durga Parshad and for that matter also of Jamna Das, cannot re-agitate this question. It is also significant that on the present record no attempt whatever appears to have been made to prove that the sale in favour of Sham Lal and his wife had taken place at any time prior to the institution of the suit.

[12] Coming now to the question of forfeiture it is strenuously contended on behalf of the appellant that the disclaimer of her title by the respondents in the reply sent by them on 20th February 1942 to her notice of 16th February 1942 is enough to work a forfeiture and consequently they are liable to be ejected from the house in question. Reference in this connection is first made to S. 111 (g), T. P. Act, which *inter alia* enacts that:

[12A] "A lease of immoveable property determines

(g) by forfeiture; that is to say (1) or (2) in case the lessee renounces his character as such by setting up a title in a third person or by claiming title in himself."

[13] It is urged that though the Act does not apply to the province of Delhi its principles have always been held in this Court to apply to that province. Even otherwise by S. 6, Punjab Laws Act, 1872, the Judges are required to decide according to justice, equity and good conscience, "in cases not otherwise specially provided for" and the provision of law as enacted in S. 111 (g) being consonant with these principles, should

be applied in the present case. It is added that to introduce any more hard or more strict technicality of law in provinces where the Act does not apply would evidently be repugnant to the principles mentioned above and it is clear that in S. 111 (g) it is not prescribed what form the renunciation should take. For this position support is further sought from 34 Mad. 161,³ 41 Mad. 629,⁴ 46 I. C. 62,⁵ 70 I. C. 349,⁶ A. I. R. 1923 Lah. 409⁷ and 13 Lah. 796.⁸

[14] In 34 Mad. 161³ the defendants were permanent lessees and they denied the title of their landlord, the plaintiff, by a notice in writing before the suit for ejectment was instituted against them. The question arose whether the denial of the plaintiff's title worked a forfeiture of the lease and a Division Bench of the Madras High Court composed of Benson and Krishnaswami Aiyer JJ. replied in the affirmative. The lease in question was not governed by the Transfer of Property Act. In 41 Mad. 629,⁴ decided by Seshagiri Ayyar and Napier JJ., a similar question arose and was answered similarly. The lease in that case too was not governed by the Transfer of Property Act and was for the lifetime of the tenant. Seshagiri Ayyar J. in the course of his judgment observed that, although the Transfer of Property Act had no application to the terms of that tenancy, the principle of S. 111 (g) should be applied to the case. It was further remarked that there was no justification for the view that a lease for a term would enure for the full length of it notwithstanding the denial of title by the tenant. In 46 I. C. 62⁵ decided by Abdur Rahim and Oldfield JJ. a similar principle was laid down but it may be pointed out that the denial of title relied upon in that case had been made in a judicial proceeding. In 70 I. C. 349⁶ Broadway J. remarked that though the Transfer of Property Act was not in force in this province, it had repeatedly been held that the Courts in the Punjab would be guided by the principles enunciated therein. He accordingly relied on S. 111 (g) while disposing of a case relating to the

3. ('11) 34 Mad. 161; 6 I.C. 447, Padmanabaya v. Ranga.

4. ('19) 6 A.I.R. 1919 Mad. 1106; 41 Mad. 629; 45 I. C. 743, Komalukutti v. Mahomed.

5. ('19) 6 A. I. R. 1919 Mad. 897; 46 I. C. 62, Rama Iyengar v. Gurusami Chetty.

6. ('24) 11 A. I. R. 1924 Lah. 281; 70 I. C. 349, Chiragh Din v. Mahomed Usman Khan.

7. ('28) 10 A. I. R. 1923 Lah. 409; 71 I. C. 779, Kewal Ram v. Abdul Hai.

8. ('33) 20 A. I. R. 1933 Lah. 221; 13 Lah. 796; 141 I. C. 825, Mela Ram v. Sandhi Khan.

forfeiture of a tenancy. The denial, however, relied upon in that case had been made in a declaratory suit prior to the institution of the suit under appeal. In A. I. R. 1923 Lah. 409⁷ decided by Sir Shadi Lal C. J. and Fforde J. the suit related to a permanent tenancy and the question arose whether such tenants were liable to ejectment on account of the denial of the landlord's title and the answer proceeded in favour of the landlord principally on the basis of S. 111 (g), T. P. Act. In 13 Lah. 796⁸ decided by Sir Shadi Lal C. J., and Broadway J. it was remarked :

[15] "It is a settled rule of law that a disclaimer of the landlord's title made before the suit for ejectment, occasions a forfeiture of the tenancy, and this rule applies to all tenancies permanent or otherwise."

[16] In A.I.R. 1946 Mad. 57⁹ Chandrasekhara Aiyar J. observed that in cases in which the Transfer of Property Act does not apply, clear and unambiguous denial of the landlord's title would be enough to work out a forfeiture and to support a suit in ejectment of the tenant. It was further added that there is really no authority for holding in India that before there can be a forfeiture the denial of the landlord's title to work out a forfeiture of the tenancy must be embodied in a judicial proceeding.

[17] Counsel for the appellant also referred in this connection to para. 281 at p. 248 of Vol. 20 of Halsbury's Laws of England, 2nd edition, the material portion of which reads as follows :

[18] "There is implied in every lease a condition that the lessee shall not do anything that may prejudice the title of the lessor, and that if this is done the lessor may re-enter for breach of this implied condition. Thus, it is a cause of forfeiture if the lessee denies the title of the lessor by alleging in writing — or, in the case of a tenancy from year to year, *either in writing or verbally*—that the title to the land is in himself or another; or if he assists a stranger to set up an adverse title, as where he acknowledges the freehold title to be in him, or delivers the premises to him in order to enable him to set up a title. In the case of a tenancy from year to year, the effect of such denial of title is that the tenancy may be forthwith determined by the landlord without notice to quit."

[19] (1881) 16 Ch. D. 730¹⁰ was also cited where a letter sent by the tenants stating that they disputed the landlord's alleged right to raise the rent, was held to amount to a repudiation of the relation of landlord and tenant and thus sufficient for their ejectment

without proving a valid notice to quit. It may, however, be observed that the tenancy in that case was from year to year.

[20] Had the matter rested here, it would have been easy to adjudicate upon the question at issue. The difficulty, however, arises on account of the remarks made by their Lordships of the Privy Council in a judgment reported in 42 Mad. 589,¹ which is the principal judgment relied upon by the respondents. In that case a suit for ejectment had been brought by the Maharaja of Jeypore in the capacity of a landlord against his tenant for possession of a *pargana* held by the latter. One of the allegations on which relief was claimed was as stated by their Lordships at page 594, that when called upon to pay the full rent due from him, the defendant had repudiated his landlord's title and when warned of the consequences and given an opportunity for withdrawing his repudiation had persisted therein. At page 597 their Lordships further observed :

[21] "In their Lordships' opinion it is a consequence of the decision of the High Court that the respondent holds a tenure derived from the *zemin-dari* of the Maharaja, and there is an obligation upon the tenant for the time being to pay the rent, and, so far as modern conditions of Society and law permit, to render the service prescribed by the patta.

[22] So far they accede to the contentions of the appellant, they have now to inquire whether in these circumstances the acts and omissions of the deceased defendant were such as to create a forfeiture of his estate."

[23] Their Lordships then referred to para. 31 of the plaint and stated that two grounds of forfeiture had been raised therein, "the second which their Lordships proposed to discuss first being that the tenant had repudiated his landlord's title." Their Lordships then added :

[24] "It must be accepted that it is the law of India that there are circumstances in which such a repudiation will work a forfeiture. This law is not ancient Indian law, but has been adopted by the Courts from the law of England, and is now embodied in a statute."

[25] Section 111 (g), T. P. Act, 1882, was then reproduced and it was remarked :

[26] "This statutory provisions not being retrospective does not govern the present case. But it is in substance the placing in a statutory form of the rule of law which had been already adopted by the Courts in India : see 24 Cal. 440.¹¹

[27] They are directed by the several charters to proceed where the law is silent, in accordance with justice, equity and good conscience and the rules of English law as to forfeiture of tenancy may be held and have been held to be consonant

11. (97) 24 Cal. 440, Kally Dass v. Monmohinee Dassee.

9. (46) 33 A.I.R. 1946 Mad. 57: 222 I. C. 646 Ramachandra Prabhu v. Mahadevi.

10. (1881) 16 Ch. D. 730 : 50 L. J. Ch. 331 : 44 L. T. 210 : 29 W. R. 504, Vivian v. Moat.

with these principles and to be applicable to India: see 28 Cal. 135.¹²

[28] Now the rule of English law is that a tenant will forfeit his holding if he denies his landlord's title in clear, unmistakable terms, whether by matter of record, or by certain matters *in pais*.

[29] The qualification that the denial must be in clear and unmistakable terms has not unfrequently been applied by the Courts in India, which have held that where a tenant admits that he does hold as a tenant of the person who claims to be his landlord, but disputes the terms of the tenancy, and sets up terms more favourable to himself, he does not, though he fails in establishing a more favourable tenancy, so far deny the landlord's title as to work a forfeiture; see

[30] Counsel for the respondent contended that she was entitled to the benefit of these rulings and, that in this case there was no such clear and unmistakable denial.

[31] Whether this be so or not, their Lordships do not find it necessary to decide for the following reasons: (1) There is here no denial by matter of record before the present suit was instituted. Denial in the suit will not work a forfeiture of which advantage can be taken in that suit, because the forfeiture must have accrued before the suit was instituted: see (2) As to forfeiture by matter *in pais*, this, according to English law, occurred when by the Real Property Act it was provided that no feoffment should have in future any tortious operation, the reason for imposing a forfeiture ceased.

[32] It never was applicable in India, and their Lordships can find no authority for saying that an 'innocent conveyance' ever operated in England as a cause of forfeiture, or that it has ever been held so to operate in India.

[33] Some confusion has arisen from a misunderstanding of the reason why a tenant from year to year may, when he has denied his landlord's title, be ejected without notice (1881) 16 Ch. D. 730.¹⁰

[34] It is not because the denial or disclaimer works a forfeiture.

[35] That a tenant who disputes his character as tenant does not thereby forfeit a lease for a term certain is shown by (1839) 10 A. & E. 427.¹³

[36] The doctrine in (1881) 16 Ch. D. 730¹⁰ does not apply to Indian tenures such as the present: see

[37] This being so there was in the present case no such renunciation by the tenant of his character as such as to work a forfeiture."

[38] On behalf of the appellant it is contended that inasmuch as the tenant in that case had not denied his liability to pay a fixed rent as per permanent settlement records and had even remitted along with his so-called repudiation a sum of money by way of rent, the observations made by their Lordships should be taken to mean only

12. ('01) 28 Cal. 135, Nizamuddin v. Mamtoz-uddin.

13. (1839) 10 A. & E. 427: 8 L. J. (N S) Q. B. 265, Doe d. Graves v. Wells.

that the renunciation did not at all amount to a disclaimer of the landlord's title and consequently this judgment does not hurt him in the least. It is further stressed that their Lordships had approvingly referred to 28 Cal. 135¹² and there the denial of the title was merely verbal.

[39] On behalf of the respondents, on the other hand, it is pointed out that, although arguments were advanced before their Lordships that the denial was not in clear and unmistakable terms and that the tenant while admitting that he held as a tenant had merely disputed the terms of the tenancy, their Lordships did not choose to decide this matter on the simple ground as stated by them that "there is here no denial by matter of record before the present suit was instituted." Consequently, where their Lordships at page 600 observed, "there was in the present case no such renunciation by the tenant of his character as such as to work a forfeiture" their Lordships were evidently referring to what they had stated above about there being no denial by matter of record. It is further stated that in 24 Cal. 440¹¹ which was approvingly referred to by their Lordships the previous denial had been made in a judicial proceeding.

[40] Reliance in this connection was also placed on 59 Bom. 194² where a similar restrictive interpretation was put upon this judgment of the Privy Council. In that case too S. 111, T. P. Act did not apply in terms and the denial relied upon had been made in a written application to the revenue authorities. A question *inter alia* arose whether that denial worked a forfeiture of the tenancy and Baker J. who heard the appeal in the first instance sitting singly replied in the affirmative. A Letters Patent appeal was, however, taken against his decision, and it was heard by Broomfield and Wadia JJ. The judgment was delivered by Broomfield J. who after fully discussing the implications of the judgment of their Lordships of the Privy Council considered above observed at p. 211:

[41] "There is, in my opinion, great force in the contention that there is something decidedly technical about the English law on the subject and that matter of record means more than a document of a formal or solemn character and will not necessarily include, as Baker J., suggests, a denial made in a written application to the revenue authorities with the object of setting the law in motion, that is by causing the name of the defendant to be entered in the revenue records instead of the name of the plaintiff."

[42] At page 212 the learned Judge added:

[43] "It was for the plaintiff to show that under the English law, a statement made in an application

of this kind should be regarded as working a forfeiture. In my opinion he has not succeeded in doing so."

[44] At page 214 it was observed :

[45] "On principle, then, I feel considerable difficulty in holding that the English law, which is admittedly the law to be applied so far as it is applicable to India, requires us to hold, as a matter of justice, equity and good conscience, that there has been an effective forfeiture in the circumstances present here. I think there is a good deal to be said for the view that where the Transfer of Property Act does not apply, the disclaimer of the landlord's title, even though clear and unequivocal and even though made in a judicial proceeding, would not operate as a forfeiture of the tenancy, unless it amounts to an estoppel or comes within the mischief of the rule that a man may not approbate and reprobate, or is made in such circumstances that it would render the tenant's possession adverse to the landlord."

[46] The learned Judge, however, added :

[47] "I am not prepared on the materials placed before us to commit myself to that proposition, nor is it necessary, because, assuming that what I may call a bare disclaimer in matter of record is legally sufficient to work a forfeiture, I hold that anyhow the Courts have the power to relieve against it."

[48] At page 217 it was finally remarked :

[48A] "To sum up my conclusions, I find that there has been no forfeiture in the case from which Letters Patent Appeal No. 13 arises as there has been no disclaimer by matter of record before the suit."

[49] The appeal was accordingly allowed.

[50] The English text-books, to which our attention has been directed, go a long way to support this view. In Bacon's Abridgement—Leases and terms for years—T 2 at page 884 referred to by their Lordships of the Privy Council in 42 Mad. 589¹ it is said :

[51] "A lessee may thus incur a forfeiture of his estate by act *in pais*, or by matter of record. By matter of record, where he sues out a writ, or resorts to a remedy, which claims or supposes a right to the freehold; or, where in an action by his lessor grounded on the lease, he resists the demand under the grant of a higher interest in the land; or, where he acknowledges the fee to be in a stranger; for having thus solemnly protested against the right of his lessor, he is estopped by the record from claiming an interest under him. By act *in pais* as, where he alienates the estate in fee."

[52] In Cole on Ejectment (1857) at page 439 it is observed :

[53] "If a lessee does any act in a Court of record, whereby he disaffirms or impugns the title of his lessor, his term is thereby forfeited, by virtue of the common law."

[54] It is, however, added that this can seldom happen now that real actions and fines and recoveries are abolished. It is further said that a disclaimer by matter *in pais* is not sufficient to create a forfeiture for a term of years.

[55] In Woodfall's Law of Landlord and Tenant (1939) at page 912, it is remarked :

[56] "Besides incurring a forfeiture by the

breach of express condition, which will be hereafter considered, a lessee may incur a forfeiture for breach of implied conditions, either by matter of record, or by act *in pais*; (1) by matter of record, where he sues out a writ, or resorts to a remedy which claims or supposes a right to the freehold, or where in an action by lessor grounded upon the lease, he resists the demand under the grant of a higher interest in the land; or where he acknowledges in Court the fee to be in a stranger; for having thus solemnly protested against the right of his lessor, he is estopped by the record from claiming an interest under him; but anything of this sort can seldom now happen, real actions having been abolished; (2) by act *in pais*, where he alienates the estate in fee."

[57] At page 988 it is said : "The other cases of forfeiture by disclaimer of a term certain have been by matter of record."

[58] It may be observed in this connection that in Phipson's Law of Evidence (1930) at page 656 under the heading "Estoppels by Record" it is remarked :

[59] "The chief of these are judgments, the conclusiveness of which has, for convenience, already been considered in conjunction with their admissibility. An estoppel by record is also probably created by Letters Patent between the Crown and the grantee."

[60] Similarly in Best on Evidence (1922) in paragraph 539 it is said :

[61] "Estoppels by matter of record; as Letters Patent, fine, recovery, pleading, & etc. The most important form of this is estoppel by judgment."

[62] Interpreted against this background, the judgment of their Lordships of the Privy Council in 42 Mad. 589¹ can bear only one meaning, viz., that a disclaimer of the landlord's title unless it is in a judicial proceeding or other public document, which is covered by the term 'record' in English law, is not enough to work a forfeiture. It cannot, therefore, be said, as stated by Chandrasekhara Aiyar J. in A. I. R. 1946 Mad. 57,⁹ that there is no authority for holding in India that before there can be a forfeiture the denial of landlord's title must be embodied in a judicial proceeding. It is true that in enunciating this principle, one makes the law in those provinces where the Transfer of Property Act does not apply much more stringent than the one applicable to the provinces where that Act is in force. But so long as the Privy Council judgment is not found to bear any other interpretation, the law as declared by it must or "so far as applicable be recognised as binding on and be followed by all Courts in British India," (S. 212, Government of India Act, 1935). I would, therefore, hold that in this case no ground has been made out for forfeiting (*sic*: forfeiting) the tenancy of the respondents.

[63] In this view of the case no other question arises but if it was necessary to decide whether in the circumstances the forfeiture, if any, had been waived or whether the respondents could be relieved against it, I would decide these matters on the principles laid down in the Transfer of Property Act in this connection, not because the provisions as contained in that Act apply but because it can be said that to do so is consonant with justice, equity and good conscience.

[64] Under section 112 of the Act:

[65] "A forfeiture under S. 111, cl. (g), is waived by acceptance of rent which has become due since the forfeiture or by distress for such rent or by any other act on the part of the lessor showing an intention to treat the lease as subsisting: Provided that the lessor is aware that the forfeiture has been incurred: Provided also that, where rent is accepted after the institution of a suit to eject the lessee on the ground of forfeiture, such acceptance is not a waiver."

[66] Here the suit for rent was obviously brought after the suit for ejectment. Further, no rent was accepted at all but was merely claimed and that claim too was given up later. There could be no waiver, therefore, of the forfeiture if it had once been incurred. A decision on these lines would even be in accord with the principles enunciated in several decided cases to which our attention has been drawn; e. g., (1872) 7 Q. B. 344,¹⁴ (1920) 2 K. B. 315,¹⁵ 132 I. C. 875,¹⁶ 34 Mad. 161³ and 15 I. C. 445.¹⁷

[67] On the question whether the forfeiture could be relieved against, suffice it to say that there is no provision whatever in the Transfer of Property Act for any such relief, and consequently the forfeiture, if incurred, could not be relieved against in this case: see A. I. R. 1943 ALL. 279¹⁸ and 41 Mad. 629⁴ per Seshagiri Ayyer J.

[68] On the grounds set forth above, I would maintain the decision of the learned Single Judge and dismiss this appeal. In the circumstances, however, I would leave the parties to bear their own costs throughout.

[69] Before concluding, I may observe that I am not satisfied with the result and that on the question of forfeiture I would have held exactly to the contrary had I not

felt myself bound by what I have understood to be the principle laid down by their Lordships of the Privy Council in 42 Mad. 589.¹ This case hails from the Province of Delhi but the same state of affairs prevails in the Punjab where too ss. 111 to 116, T. P. Act, do not apply in terms. I would, therefore, direct that a copy of this judgment be forwarded to the Provincial Government with a view to removing the anomaly by extending these sections to the Punjab and I believe that a similar step will consequently be taken by the Central Government in respect of the province of Delhi too.

[70] **Abdur Rahman J.**— I agree although I feel free to confess that I do not at all feel happy with the result at which my learned brother has arrived. Section 111, T. P. Act, has not been extended to the province of the Punjab and Delhi so far, and the law in these territories has been found to be more stringent than in the other Indian provinces to which the Act was applicable. A tenant's act or conduct in denying the tenancy-at-will—as long as he does not do so in judicial proceedings—has thus to go unpunished. While hearing the case, I hoped that the Common Law of England which has to be applied in the absence of a statute as a matter of justice, equity and good conscience was correctly enunciated by Lord Halsbury in his well-known and well-recognised work on the Laws of England; but, on a close study of the decision by their Lordships of the Judicial Committee in 42 Mad. 589,¹ I have to agree, although not without reluctance, that it is not possible to distinguish that case and to hold that a denial of tenancy, even when in writing, carries the sanction of forfeiture behind it as long as the denial is not a matter of record. I do hope, however, ss. 111 to 116, T. P. Act, would be extended to the provinces of the Punjab and Delhi by their respective Governments without any delay and this unsatisfactory state of affairs would be brought to an end.

[71] **Muhammad Sharif J.** — I agree with my learned brothers.

K.S.

Appeal dismissed.

[Case No. 66.]

* A. I. R. (33) 1946 Lahore 338

FULL BENCH

RAM LALL, MUNIR AND KHOSLA JJ.

In re G., ex-Advocate, Lahore.

Civil Misc. Petn. No. 445 of 1945, Decided on 22nd April 1946.

14. (1872) 7 Q.B. 344; 41 L. J. Q. B. 98; 26 L. T. 292; 20 W. R. 411, Tolaman v. Portbury.

15. (1920) 2 K. B. 315; 89 L. J. K. B. 845; 123 L. T. 328, Evans v. Enever.

16. (31) 18 A. I. R. 1931 Pat. 240; 132 I.C. 875; Upendranath v. Dhubeswar Lal Singh.

17. (12) 15 I. C. 445 (Mad.), Chengiah v. Damara Kumara Thimma.

18. (43) 30 A. I. R. 1943 All. 279; 208 I. C. 422, Anand Sarup v. Taiyab Hasan.

(a) Letters Patent (Lahore), Cl. 8—Proceeding under Cl. 8 against practitioner convicted of criminal offence — Legality of conviction cannot be challenged.

Where a proceeding under the Letters Patent for disciplinary action is taken against a practitioner on the ground of his having been convicted for a criminal offence, the legality of the conviction cannot be challenged except perhaps on the ground of jurisdiction, as in such proceeding the High Court cannot sit in appeal on the merits of convictions for criminal offences. [P 340 C 2 ; P 341 C 1]

(b) Legal Practitioner — Retention or re-admission — Question as to — Hardship and pity are no considerations — Unsuitable persons cannot be admitted or retained as matter of grace or charity — Court's duty is to safeguard larger interests of legal profession and litigants.

The question of retention on or re-admission to the roll of Advocates cannot be decided on considerations of individual hardship or on appeal to one's sense of pity. The High Court in the exercise of its disciplinary jurisdiction has to safeguard the larger interests of the legal profession and the litigant public and unsuitable persons cannot be admitted or retained as a matter of grace or charity. The Court's effort should be to try and keep the profession of law free from influences that may degrade or corrupt it and on the other hand to protect the litigant public against persons whose character is proved to be such that it would be unsafe to allow them to occupy the position of privilege commanded by Advocates of the High Court. [P 341 C 1, 2]

* (c) Legal Practitioner — Conviction — Re-admission — Most important question is whether Advocate's character precludes him from remaining on roll of Advocates—That Advocate belongs to respectable family is no ground for leniency — Undertaking not to misbehave in future is weak piece of evidence to show that he has become fit : C. M. No. 110 of 1945, *OVERRULED* ; ('36) 23 A. I. R. 1936 Lah. 717, *held overruled in* ('41) 23 A. I. R. 1941 Lah. 384 (F. B.).

Where an Advocate who has been removed from the roll of Advocates as a result of his criminal conviction applies for re-admission, by far, the most important question in such matter is, not whether he has or has not been punished sufficiently, but whether his character as shown by the facts leading upto his conviction is such that he should not be allowed to remain on the roll of Advocates of the Court. It is not by way of punishment that the Courts in such cases exercise their discretion. That the Advocate belongs to a respectable family affords no ground for leniency, for, in such proceedings the Court is not assessing the amount of punishment. That is the peculiar function of the criminal Courts. Nor is the Court assessing the burden of punishment on those who may have the misfortune to be intimately connected with an Advocate who has been found guilty of offences involving moral turpitude to the extent disclosed. The undertaking not to misbehave in future is no more than a weak, because it is an interested piece of evidence to show that a person who was found unfit once has become fit again : (1778) 2 Cowp. 829, *Rel. on*; C. M. No. 110 of 1945, *OVERRULED*; ('36) 23 A. I. R. 1936 Lah.

717, *held overruled in* ('41) 23 A. I. R. 1941 Lah. 384 (F.B.). [P 341 C 2 ; P 342 C 1]

(d) Legal Practitioner — Moral turpitude — Reinstatement — Moral turpitude is no absolute bar to reinstatement — Applicant can satisfy Court that he has got so chastened by remorse and hardship that he can resist temptations to which he gave way once — Onus to prove reformed character is on applicant — Nature of evidence required indicated.

There is no absolute bar to the re-admission of an Advocate removed for misbehaviour involving moral turpitude. The punishment is not perpetual but the only set of circumstances in which such a person can be readmitted is when, if at all, he can satisfy the Court that as the result of the punishment he has undergone since his exclusion, he has got so chastened by remorse and hardship that the temptations to which he gave way once, when he committed acts justifying his exclusion, are such that he, by virtue of his reformed character, will now be able to resist. The onus of proving that his character has been so reformed is on the applicant, and he must discharge that by evidence. What type and amount of evidence is required will naturally depend on the facts of each case, but it certainly cannot be a mere assertion by the applicant himself coupled with an assurance to behave in future. The nature and the gravity of the offence originally committed by him has to be considered, as also the effect that the punishment for the offence and hardship during the period of exclusion are likely to have had on his character. Evidence usually in the form of affidavit, should be furnished by the petitioner for re-admission which tends to show that during the period of exclusion he has led a blameless life and has earned the esteem and regard of his neighbours. He could show in a variety of ways that in him has awakened a higher sense of honour and duty since he originally committed the offence justifying his removal. This he must prove affirmatively and satisfy the conscience of the Court dealing with the petition for reinstatement that he has in fact acquired that sense of duty, honour and integrity which he once lost, and that therefore it would be safe to readmit him, without degrading the profession of law and without danger to the litigant public: (1865) 34 L. J. Q. B. 121; ('37) 24 A. I. R. 1937 All. 50 (F.B.); ('37) 24 A.I.R. 1937 Bom. 48 and 38 Cal. 309, *Rel. on*; C. M. No. 206 of 1940, *Expl.* [P 342 C 1, 2]

Bawa Faqir Singh —for Petitioner.

Basant Krishan Khanna, Advocate-General — for the Crown.

Ram Lall J.—These three petitions will be dealt with in one judgment as similar questions are involved. I. The first case is that of Mr. S. where the facts are as follows: Mr. S. was admitted as an Advocate of this Court in February 1927, and later went to Kenya, and was there enrolled as an Advocate of the Supreme Court of Kenya, where he started practice. In March 1942, he was convicted by a criminal Court for the offence of offering a bribe to a prosecutor in charge of a criminal case against a client of Mr. S. and sentenced to eighteen months' imprisonment with hard labour. This sentence was

reduced on appeal to one of nine months on 29th April 1942. He was struck off the Rolls of the Kenya Court in consequence of this conviction and intimation of this fact was sent to this Court. In these proceedings Mr. S. has been called upon to show cause why he should not be dismissed from practice or otherwise dealt with under Cl. 8, Letters Patent.

[2] Before these proceedings were instituted and after he had served out his sentence of imprisonment, Mr. S. made an application to the Chief Justice of the Supreme Court at Kenya praying that he should be readmitted there as an advocate. The learned Chief Justice of Kenya held that the application was maintainable. A number of affidavits were placed before the Court to the effect that since his conviction, Mr. S. had worked as the managing clerk of his son who was a practising barrister and that his conduct during that period had been good and therefore his readmission was recommended. The learned Judge, however, in rejecting the application on the merits, observed as follows:

[3] "The applicant was convicted of a most serious criminal offence, one of exceptional gravity when committed by an advocate in the course of his profession. He endeavoured to bring about a miscarriage of justice. For that exceptionally grave offence having been committed and sentenced and his appeal from the conviction having been dismissed he was struck off the Roll of Advocates. Approximately two years afterwards he applies to be restored to the Roll. His application must fail. The application is refused. As to any future applications he may make it is not for me to embarrass my successor or any other Judge by predicting their prospects of success or failure. Any such application will have to be considered on its merits, if, and when made."

[4] It is contended before us now that during the 3½ years that have expired since he was struck off the rolls in Kenya, he has behaved with honesty in dealing with the litigant public as the managing clerk of his son and that, therefore, he has now reclaimed his character. The Chief Justice of Kenya apparently left it open to him to apply to be readmitted, and if he is struck off the rolls of this Court now he will be embarrassed and hampered in making an application for readmission again in the Kenya Court.

[5] II. The facts in the second case, that of Mr. J. are that his name was struck off the Roll of Advocates of this Court on 1st May 1940, for having embezzled over Rs. 300 entrusted to him by a client. The allegation was admitted and he threw himself on the mercy of the Court, pleading further that, the money embezzled had been repaid

to the client. He made various applications from time to time, praying for reinstatement, but these were rejected and he has come up again now adding to his previous arguments, an affidavit by himself stating that on and off, he has been preparing briefs for his lawyer friends and so coming into contact with the litigant public with whom he has been behaving with integrity during six years, and claims that having repented of his offence when he succumbed to sudden temptation, has now reclaimed his character, and can be readmitted with safety on the Roll of Advocates of this Court.

[6] III. In the third case, the facts are that Mr. G. was a member of the Punjab Provincial Service (Judicial Branch) and on being retrenched qualified himself as a lawyer and was enrolled as an advocate of this Court in 1934. He was convicted by a criminal Court in March 1938, but a retrial was ordered when another Magistrate acquitted him. The Provincial Government appealed against this acquittal and the High Court on such appeal convicted and sentenced him to pay a fine of Rs. 1000 under S. 193, read with S. 109, Penal Code, and a fine of Rs. 500 under S. 419, Penal Code, on 8th November 1939. Consequent on this conviction, he was ordered to be struck off the Roll of Advocates on 30th April 1940 and several applications by him for reinstatement having been refused he has applied again now and supported his application with affidavits showing that he has been working for several firms where in the course of his employment he had to deal with monies and has carried out his duties with integrity and diligence to the satisfaction of his employers.

[7] Bawa Faqir Singh who appeared for Mr. G. took the frivolous plea, among others, that the conviction by the High Court was without jurisdiction as the requisite sanction of Court concerned had not been taken before a prosecution for perjury was launched. There is no force in the contention, and no useful purpose will be served by detailing the facts on which it was based, beyond saying that the objection is completely met by S. 195 (2), Criminal P. C., and, in any case, the prosecution for cheating under S. 419, Penal Code, required no sanction of any authority. The case must, therefore, be dealt with on the footing that in proceedings under the Letters Patent for disciplinary action, the legality of a conviction cannot be challenged except perhaps on the ground of jurisdiction. In the case of

Mr. G., Mr. Badri Das said that the conviction was by foreign Court, but when we offered to hear the evidence and come to an independent finding as to his guilt, he did not press his contention. It may be remarked that in the Kenya Court he did not challenge the correctness of his conviction when he prayed for reinstatement and apparently so far as proceedings of a disciplinary character in Kenya are concerned, he could not go behind the factum of conviction. In Mr. J.'s case the offence was admitted when disciplinary action was taken, though, then as now, mitigating circumstances were pleaded. In Mr. G.'s case the conviction was by a Court of competent jurisdiction, and for the purposes of these proceedings must be taken to be correct, as obviously we cannot sit in appeal here on the merits of convictions for criminal offences.

[8] It comes then to this that in Mr. S.'s case, he was convicted for having attempted to bribe a public servant to show favour to a client for whom he was acting. Mr. J. embezzled monies entrusted to him by a client, though he made good the money when disciplinary proceedings were commenced, and Mr. G. was guilty of the offence of cheating and perjury. All the offences by these three persons were committed while acting as Advocates or in relation to their duties as such. It has not been suggested before us that these two gentlemen should not have been struck off the rolls of this Court and the only question for disposal is whether, with reference to the nature of the offence in each case, a case has been made out for their re-admission into the honourable profession of law at this stage. All the petitioners have pleaded poverty and the obligations to maintain large families. While Mr. S. and Mr. J. threw themselves unreservedly on the mercy of the Court, it was contended on behalf of Mr. G. that there are three decisions of this Court in which the degree of guilt of the Advocates concerned was greater than that of Mr. G. and yet they were readmitted. These decisions were put forward as precedents for us to follow and, therefore, it will be necessary to deal with each of them and consider what legal principle for our guidance can be deduced from these cases. Before examining these cases, however, I might express my own opinion on one point and that is that the question of retention on or readmission to the roll of Advocates, cannot be decided on considerations of individual

hardship or on appeal to one's sense of pity. This Court, in the exercise of its disciplinary jurisdiction, has to safeguard the larger interests of the legal profession and the litigant public and unsuitable persons cannot be admitted or retained as a matter of grace or charity. Our effort should be to try and keep the profession of law free from influences that may degrade or corrupt it and on the other hand to protect the litigant public against persons whose character is proved to be such that it would be unsafe to allow them to occupy the position of privilege commanded by Advocates of this Court.

[9] Of the three cases quoted as precedents by Bawa Faqir Singh on behalf of Mr. G., the first is that of Mr. Osborne reported in 165 I. C. 601.¹ In that case the Advocate concerned had been convicted for embezzling a client's money and yet he was ordered by a Division Bench to be suspended for a period of eighteen months only. This case was considered by a Full Bench, reported in I. L. R. 1941 Lah. 731.² The judgment was delivered by me and with reference to this particular case I said:

[10] "It has been urged that a similar punishment should be inflicted in this case (also a case of embezzling a client's money). I am wholly unable to agree with the submission made or with the principle on which the decision referred to rests."

[11] It appears to me that for all practicable purposes the decision in 165 I. C. 601¹ stands overruled. The next case referred to is the unreported case of one *Behari Lal Advocate*, (C. M. No. 110 of 1945.)³ In this case, Behari Lal had been convicted for embezzling a large sum of money entrusted to him by a client and was sentenced by a criminal Court to two years' imprisonment and a fine of Rs. 13,000 which apparently was never realized. In his case a Division Bench reinstated him on the roll of Advocates some nine years after his removal, on the ground that he had led an honest life since his release from jail, he belonged to a respectable family and he undertook not to misbehave in future, and that he had been sufficiently punished. With the greatest respect, I am unable to agree with this decision and the principle on which it purports to rest. By far the most important question in such matters is not whether a man has or has not been

1. (36) 23 A. I. R. 1936 Lah. 717 : 165 I. C. 601, *Emperor v. O., an advocate.*

2. (41) 28 A. I. R. 1941 Lah. 384 : I. L. R. (1941) Lah. 731 : 196 I. C. 730 (F.B.), *In the matter of B., a pleader, Simla.*

3. C. M. No. 110 of 1945, decided on 23rd April 1945.

punished sufficiently but, whether his character as shown by the facts leading upto his conviction is such that he should not be allowed to remain on the roll of Advocates of the Court. It was thus that the matter was regarded by Lord Mansfield in (1778) 2 Cowp. 829⁴ where he said that it is not by way of punishment that the Courts in such cases exercise their discretion.

[12] The principle thus enunciated by Lord Mansfield, so far as I am aware has never been questioned during the last 150 years or more. It appears to me that the offence of Behari Lal showed a degree of moral depravity and turpitude which time alone could not wipe out. That he belonged to a respectable family appears to me to afford no ground for leniency, for, as I have said, in these proceedings we are not assessing the amount of punishment. That is the peculiar function of the criminal Courts. Nor are we assessing the burden of punishment on those who may have the misfortune to be intimately connected with an advocate who has been found guilty of offences involving moral turpitude to the extent disclosed. The undertaking not to misbehave in future is no more than a weak, because it is an interested piece of evidence to show that a person who was found unfit once has become fit again.

[13] There is no absolute bar to the readmission of an Advocate removed for misbehaviour involving moral turpitude. The punishment is not perpetual but the only set of circumstances in which such a person can be readmitted is when, if at all, he can satisfy the Court that as the result of the punishment he has undergone since his exclusion, he has got so chastened by remorse and hardship that the temptations to which he gave way once, when he committed acts justifying his exclusion, are such that he, by virtue of his reformed character, will now be able to resist. The onus of proving that his character has been so reformed is on the applicant, and he must discharge that by evidence. What type and amount of evidence is required will naturally depend on the facts of each case, but it certainly cannot be a mere assertion by the applicant himself coupled with an assurance to behave in future. The nature and the gravity of the offence originally committed by him has to be considered, as also the effect that the punishment for the offence and hardship during the period of exclusion are likely to have had on his character. Evidence, usually

4. (1778) 2 Cowp. 829, Ex parte Brounsall.

in the form of affidavit, should be furnished by the petitioner for readmission which tends to show that during the period of exclusion he has led a blameless life and has earned the esteem and regard of his neighbours. This evidence to my mind, is evidence of a purely negative character and ordinarily would not be sufficient. The applicant must show that during the period of exclusion he has behaved in such a way that he is reasonably immune to the type of temptation to which he succumbed. Of course, during the period of exclusion he cannot show that he has not succumbed to the identical temptation because his circumstances have precluded the possibility of the identical temptation presenting itself. A man disbarred because he embezzled a client's money cannot show that he was offered this temptation and resisted it because while disbarred he could not have had a client who could have entrusted him with money which the applicant could have embezzled. But he could show that during the period of exclusion he was engaged in a position of trust and could have had his character not reformed, embezzled monies in that position of trust but discharged his new duties with integrity and won the esteem and confidence of his employers. He could show in a variety of ways that in him has awakened a higher sense of honour and duty since he originally committed the offence justifying his removal. This he must prove affirmatively and satisfy the conscience of the Court dealing with the petition for reinstatement that he has in fact acquired that sense of duty, honour and integrity which he once lost, and that therefore it would be safe to readmit him without degrading the profession of law and without danger to the litigant public. These tests were applied in the leading case in (1865) 34 L. J. Q. B. 121.⁵ In that case Pyke was disbarred by the Benchers of Grays Inn in 1843 for the violation of the rules of his profession. An application for restoration had been dismissed in 1845, and the application was renewed 20 years later when Cockburn C. J. observed that the applicant could not be readmitted because he had not produced evidence of good conduct since he was originally disbarred. The learned Chief Justice further observed :

[14] " We ought to bear in mind that it is not with regard to the individual himself or the punishment that he may have deservedly brought on himself that the circumstances are to be inquired into ; we have a duty to perform to the

5. (1865) 34 L. J. Q. B. 121, In re Pyke.

suitors of the Court, and not only to the suitors of the Court, but to the profession by taking care that those permitted to practise in it are persons on whose integrity and honour reliance can be placed. I think therefore if Mr. Pyke can satisfy us, whatever the business he has been carrying on that his character and conduct have been unimpeached, and are unimpeachable, by evidence of trustworthy persons, especially members of the profession, we should be disposed to listen to this application; but as it stands now, we have simply the fact that Mr. Pyke was disbarred as being unworthy to remain a member of the profession and so long as that stands, without anything more to satisfy us that Mr. Pyke is a person that ought to be admitted to the roll of attorney, we cannot give effect to the application that has been brought before us."

[15] The application was rejected with leave to renew it, if and when, Mr. Pyke was in a position to furnish evidence of the type referred to. This case indicates with what jealous care the Court will guard the interest both of the profession and of the litigant public. In a case which was no more than the breach of rules of the profession, the Court would not readmit after a lapse of 20 years or more without being satisfied on evidence (the onus being on the applicant), that the breach of rules was not likely to be repeated.

[16] The same test was applied by the Allahabad High Court by Niamat Ullah J. in delivering the judgment in a Full Bench case reported in I. L. R. (1937) ALL. 411.⁶ There a mufassil practitioner, a *mukhtar* practising in the Budaun district, was sentenced to four months' imprisonment and Rs. 500 fine on the charge of embezzling a client's money and was consequently struck off the Rolls in 1927. He applied in 1935 for reinstatement. He produced numerous certificates in support of his petition. These included certificates from the District Judge, the District Magistrate and almost all the Magistrates, Civil Judges and the Munsif of the district as also certificates given by leading citizens of the town and the neighbourhood. The learned Judges' summary of all this body of evidence was that except for one of the persons who granted a certificate, no one had had personal experience of the integrity of the applicant and their opinion came to nothing more than that they knew nothing against his character for the previous six or seven years. One gentleman had certified that the applicant had worked for him in managing his estate, and he had found him honest and straightforward. This evidence was held not to be sufficient and the appli-

6. ('37) 24 A.I.R. 1937 All. 50 : I.L.R. (1937) All. 411 : 166 I. C. 818 (F. B.), In the matter of R, a Mukhtear, Budaun.

cation was rejected. Earlier in the judgment, the learned Judge had stated what kind of tests should be employed and had observed:

[17] "The nature of the offence or misconduct for which he was disbarred, the length of time which had elapsed since his dismissal, the extent to which he has been tried in other walk of life, the opportunities he has had of acting honestly in the face of temptations and the opinion of respectable persons who have had personal experience of his honesty are the important determining factors."

[18] Though the circumstances enumerated cannot be exhaustive, I am in respectful agreement that these are the important tests and when they are not satisfied substantially, the application should be refused. Much the same test was applied by the Bombay High Court in case reported in I.L.R. (1937) Bom. 99.⁷ There a legal practitioner had succumbed to the "lure of the Stock Exchange" and became insolvent. Pending his insolvency application, he misappropriated Rs. 100 of a client's money and was sentenced to two days' imprisonment (which was the period undergone when his appeal was heard) and a fine of Rs. 100. In 1929 he was struck off the rolls for this and was restored after nearly seven years, but he showed by evidence to the Court that in the meanwhile his punishment and exclusion had "had the salutary effect of awakening in the delinquent a better sense of duty and honour." It was held that he had put forward sufficient evidence to satisfy the Court that he could now be entrusted safely with the affairs of clients. The affidavits, it was held, showed:

[19] "not only that he discharged the duties which he had undertaken to the satisfaction of his employers, who seem to be respectable men, and that he attended to their legal affairs to their satisfaction but although he was entrusted with large sums of monies, he scrupulously accounted for the same to their satisfaction."

[20] A similar view has been taken and the same tests applied by the Calcutta High Court where Mukerjee J., reviewed the authorities in case reported in 38 Cal. 309.⁸ If these tests are applied, it appears to me, with very great respect that *Behari Lal's case*³ has been wrongly decided. He had embezzled large sums of monies entrusted to him by clients and it is evident that no part of this amount had been reimbursed even after conviction. It appears to me that these monies were embezzled by him in a

7. ('37) 24 A. I. R. 1937 Bom. 48 : I.L.R. (1937) Bom. 99 : 166 I. C. 628, In the matter of an advocate.

8. ('11) 38 Cal. 309 : 8 I.C. 1108, In re Abiruddin Ahmed.

cold calculated manner, and there was no question in his case of giving way to sudden temptation under pressure of circumstances. For an offence like this, I find it difficult to conceive any evidence which even if produced, could be held sufficient for a Court to hold that such an inherent defect of character which Behari Lal's offence disclosed, had been cured. There was no evidence beyond his own assurance that the character had been reformed. I have said already, and *Pyke's case*⁵ is ample authority for the proposition, that mere lapse of time is hardly a test in such cases. In my humble judgment, the defect disclosed in this case was such that it never could have got cured, and Behari Lal's reinstatement is a precedent which I am not prepared to follow.

[21] The third case pressed upon our attention by Bawa Faqir Singh is his own case in which he says that the offence for which he was convicted involved a greater degree of moral turpitude than that of his client Mr. G. Bawa Faqir Singh was alleged to have been concerned in forging a pro-note and he was first arrested for this offence in May 1928, when he had been on the roll of Advocates for barely four years. The criminal trial was protracted for reasons over which Bawa Faqir Singh had no control and the consequent hardships were taken into account by a Bench which reinstated him in July 1945: *vide* C. M. No. 206 of 1940. The Court held that charges had been hanging over his head since 1928, and he had to undergo the heavy cost of an appeal to His Majesty which only resulted in a retrial and thus in one form or another he had been suffering considerable hardship and expense for 15 years or more. The learned Judge observed finally:

[22] "This crime was committed when he had only been a member of the profession for about three years and that is a point which can be taken in his favour. As I have said he has been made to suffer terribly for his offence and he is now a man of 59 years of age. He has assured us that if he is given an opportunity he will take full advantage of it and that he will conduct himself in accordance with the highest standard of the profession."

[23] In these circumstances 'lenient view' was taken and the Advocate reinstated. It appears to me that if the Advocate was readmitted only because he had had to go through great and terrible hardship for an offence committed some 17 years previously, the decision is not consistent with the authorities I have cited. The decision, however, can be reconciled with these authorities on the footing that the learned Judges, on a

consideration of the great hardships undergone, felt that the Advocate had awakened in him a proper sense of the duties and responsibilities of an honourable profession, and if they regarded the factum of these hardships, the lapse of time, his own assurances as pieces of evidence which satisfied them that the Advocate was not likely to repeat his offence. It is clear that the Judges were satisfied that remorse and repentance had altered Bawa Faqir Singh's character during his years of hardship and suffering, and it is in this view that the case can fall within the principles enunciated by the authorities. The fact that such evidence as was put forward by Bawa Faqir Singh would not have satisfied me is not strictly relevant. In each case the conscience of the Court has to be satisfied and one Judge may require more evidence than another. In this aspect of the matter, it becomes fruitless to enquire into the relative degree of moral turpitude involved in the offence committed by Bawa Faqir Singh and by Mr. G. The question will always remain one of fact whether the evidence adduced by the applicant is sufficient to carry conviction to the mind of the Court concerned that the character of the applicant, since the commission of the breach of rule or of law, has been rehabilitated.

[24] Applying these tests to the three cases before us, I am of the opinion that there is not sufficient material on the record to convince me that the character of any of the applicants has been rehabilitated. In the case of Mr. S. we have a number of certificates from various people with whom he has been coming into more or less casual contact. The case stands on much the same footing as the Full Bench decision⁶ of the Allahabad Court referred to already. The persons granting certificates knew nothing against the applicant. That to my mind is not enough considering the extreme gravity of the offence which was no less than an attempt to contaminate the very fountain of justice. Cogent evidence of persons who speak from intimate personal experience over a considerable period of time would I think be required before the applicant could have any reasonable hope of convincing the Court that his character had so changed that he could be readmitted with safety. He has been living in Kenya for a long time, and if he can satisfy the Kenya Court of his fitness, and that Court restores him that same evidence may be later found to be sufficient to restore him here. On the material before

us, the only order that can be made is that Mr. G. should be struck off the rolls of this Court.

[25] In the case of Mr. J. there is hardly any material before us except his own assurance, coupled with the fact that the money embezzled was paid before disciplinary action was taken. It appears to me that it was not realized by Mr. J. and his advisers, till after the hearing began that it was necessary for him to adduce evidence to prove a change in his sense of moral values. If and when he can produce such evidence a fresh application for reinstatement can be made. On the material before us, it appears to me that it is impossible to re-admit him at present, and I would reject his application.

[26] In the case of Mr. G. there is a little more evidence, but having regard to the gravity of his offence, the evidence is not sufficient to carry conviction to my mind that a higher sense of honour and integrity is now entertained by Mr. G. than was the case when he committed the offence for which he was convicted and I would reject his application also, leaving it to him to move again if and when evidence of the type indicated above is available to him. Having regard to all the circumstances of the case, I would make no order as to costs.

Munir J. — I agree.

Khosla J. — I agree.

V.R./D.H. *Applications rejected.*

[Case No. 67.]

* **A. I. R. (33) 1946 Lahore 345**

FULL BENCH

DIN MOHAMMAD, RAM LALL AND
ACHHRU RAM JJ.

Phul Chand — Plaintiff — Appellant
v.

Mehta Sundar Das and others —
Defendants — Respondents.

Second Appeal No. 586 of 1945, Decided on 9th May 1946, from judgment of Din Mohammad and Mohammad Sharif JJ., D/- 20th February 1946.

*Pre-emption—Sale of some properties—Suit to pre-empt one of them on ground of vicinage—Vendee can resist such suit on strength of title to adjoining property sold to him by same sale deed : 90 P. R. 1909 (F. B.), *Dissent.*

A vendee, in a suit brought to enforce, on the ground of vicinage, a right of pre-emption in respect of one of the properties purchased by him, can successfully resist the suit on the strength of his title to an adjoining property conveyed to him by means of the same sale deed : 90 P. R. 1909

1946 L/44 & 45

(F. B.) dissented and held not laying down good law; ('41) 28 AIR 1941 Lah. 433 (F. B.), *Rel. on.*
[P 350 C 1]

Badri Das and Inder Dev Dua —

for Appellant.

Gyan Singh Vohra — for Respondent No. 1.

Achhru Ram J. — On 1st September 1942, Jagan Nath, Ram Lal and Hans Raj, defendants 2 to 4, and Nand Lal, father of Sohan Lal and Dina Nath, defendants 5 and 6, sold a house and a shop adjoining each other and situated in the town of Dipalpur in the Montgomery District to Mehta Sundar Das, defendant 1, for a consideration of Rs. 2700 for the house and Rs. 800 for the shop. On 5th October 1943, Phul Chand, plaintiff, sued to pre-empt the sale in so far as the house was concerned, alleging that custom of pre-emption prevailed in the town generally and that he owned a shop contiguous to the house in suit and had, therefore, a preferential right of pre-emption. Pre-emption was also claimed in the first instance on the ground of the plaintiff's house having a common entrance from the street with the suit-house. This ground of claim was, however, abandoned on 8th February 1944. The plaintiff's suit was dismissed by the learned trial Judge on the ground that the vendee's shop, which was shown in the plan Ex. PL, by the letter Y and which he had purchased by means of the aforesaid sale-deed also adjoined the house in suit, and that therefore the plaintiff could not claim a superior right of pre-emption merely on the ground of contiguity. On appeal, the learned District Judge confirmed the decision of the trial Court. The plaintiff has come up in second appeal to this Court.

[2] The appeal was heard by a Division Bench on 20th February 1946. In non-suiting the plaintiff the Courts below had followed a Division Bench judgment of this Court reported in A.I.R. 1939 Lah. 77¹ in preference to a Full Court judgment of the Chief Court in 90 P. R. 1909.² In the latter case it had been held that when two houses adjoining one another are sold jointly and a suit to pre-empt the sale of one of the houses only is brought by its contiguous owner who has no superior right of pre-emption in respect of the other house, the vendee cannot successfully resist the suit on the strength of ownership of the adjoining house purchased by means of the same sale-deed. In A. I. R.

1. ('39) 26 A. I. R. 1939 Lah. 77 : I. L. R. (1939) Lah. 164 : 183 I. C. 721, Kewal Krishan v. Jain Brotherhood, Ludhiana.

2. ('09) 90 P. R. 1909 : 4 I. C. 179 (F. B.), Sanwal Das v. Gur Parshad.

1939 Lah. 77,¹ however, a Division Bench presided over by Addison and Ram Lall JJ., took a contrary view. In arguing the second appeal before the Division Bench Mr. Badri Das, the learned counsel for the appellant, challenged the correctness of the decision in A. I. R. 1939 Lah. 77¹ and contended that the Full Court judgment of the Chief Court in 90 P. R. 1909² laid down the law correctly. In view of the conflict of judicial opinion as disclosed by the aforesaid two judgments, the Division Bench referred the case to a Full Bench.

[3] In 90 P. R. 1909² the trial Court dismissed the plaintiff's suit on the ground that the plaintiff's right of pre-emption extended to both the adjoining houses that had been sold as one property and was not confined merely to the house immediately adjacent to his own, and that by confining his claim only to the latter he should be deemed to have sued for partial pre-emption. The Divisional Judge on appeal did not agree with this view. He, however, upheld the decree of the trial Court, dismissing the suit on the ground that the vendee was also at the date of the suit the owner of property adjoining the house in suit which he had purchased along with the suit house, and therefore had a right of pre-emption equal to that of the plaintiff. A second appeal from this decree was heard by a Bench consisting of Chevis and Chatterjee JJ. Chevis J. felt inclined to agree with the view taken by the trial Court as to the suit being for partial pre-emption of the sale. He also agreed with the view of the Divisional Judge as to the vendee's right to successfully resist the suit on the strength of his ownership of the adjoining house which he had purchased along with the suit house, but which had not been included in the pre-emption suit. Chatterjee J., however, differed from him on both the grounds and the case was eventually referred to a Full Bench. On such reference it came up before Rattigan, Chatterjee and Chevis JJ. Both Chevis and Chatterjee JJ. adhered to the opinions already expressed by them on both the questions. Rattigan J. agreed with Chatterjee J., in his view that the plaintiff's right of pre-emption was confined only to the house immediately adjoining his own and did not extend to the other house conveyed by the same sale deed, but on the other question involved in the appeal he preferred to agree with Chevis J. On the second question the learned Judges wrote very elaborate judgments. The first question was

finally decided in the plaintiff's favour according to the majority view. The second question, however, in view of its importance and the eminence of the learned Judges, who had given expression to conflicting views on the subject was referred to a Full Court.

[4] Rattigan J. in his judgment laid particular emphasis on what he considered to be an admitted proposition that a vendee could defeat a suit for pre-emption by acquiring, subsequent to the sale in his favour but before the institution of the suit, other property the ownership whereof conferred on him a right of pre-emption at least equal to that of the plaintiff. He was of the opinion that if the vendee could achieve this result by means of a purchase made after the sale sought to be pre-empted, there could be no reasonable ground for holding that he could not do the same by means of a purchase effected simultaneously with that of the property forming the subject-matter of the pre-emption suit. He also expressed the opinion that a right of pre-emption did not exist before, or independently of, a sale and arose only at the time the sale took place, and that, accordingly, a sale of property in favour of a purchaser who, simultaneously with that sale, also acquired some other property which placed him on a footing of equality with a prospective pre-emptor, would fail to give rise to a pre-emptive right in the latter. Chatterjee J. was of the opinion that the right of pre-emption was a substantive and primary right which inhered in the pre-emptor, and imposed a corresponding obligation in the vendor of the property, which was the subject of pre-emption; that the right existed before, and independently of, the sale; and that the sale constituted merely an infringement of this primary right by the vendor in not offering the property first to the possessor of such right, and gave rise to a secondary or remedial right in the latter to seek redress against the breach by the vendor of his legal obligation. The necessary implication of this, in the view of the learned Judge, was that the legal right, which inhered in the pre-emptor before the sale, imposing a corresponding duty on the vendor to offer the property which was the subject of pre-emption to him before selling the same to some one else, could not be prejudicially affected by the mere circumstance of the vendee having simultaneously purchased other property which, if it had belonged to him before the purchase, would have given him a similar

right. As a necessary corollary of this view, the learned Judge expressed his disagreement with the proposition, which seemed to be almost axiomatic to Rattigan J. that the vendee could better his position by other purchases, which gave him an equal right with the pre-emptor, between the date of the sale in dispute and the institution of the pre-emption suit. He was, however, also of the view that the proposition could have no bearing in favour of Rattigan J.'s opinion on the question which the Bench was called upon to decide.

[5] On reference to a Full Court the case was heard by a Bench of six Judges consisting of Sir William Clarke C. J. and Reid, Robertson, Kensington, Rattigan and Shah Din JJ. In the meanwhile in another second appeal, namely, *Dhanna Singh v. Gurbakhsh Singh*,³ a question had arisen whether a vendee could defeat a suit for pre-emption by improving his position after the date of the institution of the suit, but, before the passing of the pre-emption decree, by the acquisition of other property, which, had it belonged to him before the sale, would have given him a right of pre-emption in respect of the subject-matter of the suit, equal to that of the plaintiff. In view of the two questions being closely connected, the question arising in *Dhanna Singh v. Gurbakhsh Singh*³ was also referred to the same Bench for decision. The questions referred in the two cases were answered by the Court by means of separate judgments delivered on the same date, the judgment in *Dhanna Singh* case reported in 91 P. R. 1909.³ The question in 90 P. R. 1909² was answered, by a majority of four Judges against two, in favour of the pre-emptor, the dissenting Judges being Robertson and Rattigan JJ. The question involved in 91 P. R. 1909³ was also answered in the plaintiff's favour by a majority of five Judges against one, Rattigan J. being the only dissenting Judge. The main judgments in the two cases were written by Shah Din J. For the great legal acumen and extraordinary dialectical skill displayed in them, these judgments, as well as the dissenting judgments of Rattigan J., must always remain as classics in the literature dealing with the subject of pre-emption.

[6] In this judgment in 90 P. R. 1909² Rattigan J. developed at great length the two propositions, one relating to the right of pre-emption having no existence before and independently of the sale, and the other

3. (09) 91 P. R. 1909 : 4 I. C. 337 (F.B.).

relating to the vendee's competence to defeat a pre-emption suit by acquiring, after the date of the sale but before the institution of the suit, some other property carrying with it a right of pre-emption at least equal to that of the pre-emptor, and attempted to answer Chatterjee J.'s criticisms of his views expressed by himself in his order of reference, as well as the substantive points raised by the learned Judge in support of his own opinion. Shah Din J., fully endorsed the view of Chatterjee J., as to the right of pre-emption being, viewed as a primary right, a right existing before, and independently of, the sale, entitling the person of inherence, in preference to a third person or a class of persons, to an offer of sale of the property, which is the subject of the right, by the person of incidence, upon whom a corresponding primary duty to make such offer is laid. He was further of the opinion that the pre-emptor's cause of action was complete as soon as the person of incidence committed a breach of his obligation by a sale of the property to a third person without offering the same to the person of inherence and could not be taken away by any subsequent improvement in the position of the vendee. Unlike Chatterjee J. he did not dispute the relevancy of decisions according to which a vendee could successfully resist a pre-emption suit by acquiring, between the date of the sale and that of the institution of the suit, some property which, if it had been acquired by him before the sale would have given him a right of pre-emption equal to that of the plaintiff, but he was of the opinion that those cases had been wrongly decided. The following observations are to be found in his judgment at p. 431 of the report touching this subject:

[7] "I also concede that the decisions which lay down that the vendee can better his position by other purchases which give him an equal right with the pre-emptor between the date of the sale in dispute and the institution of the pre-emption suit are relevant to the present discussion. But those decisions, as I have ventured to hold in the Full Bench reference in Second Appeal No. 98 of 1908,³ are in my opinion, erroneous, and no aid can therefore be derived from them in this case. It seems to me with all deference, that it is a wrong application of the law of pre-emption to hold that the pre-emptor is bound to show that he had a preferential right of purchase as against the vendee not only at the date of the sale of the property in dispute but also at the time of the institution of his suit. The question of priority as between the pre-emptor and the vendee must be decided in advertence to the state of things existing at the time of the sale and not at any later period, and also with special reference to the rights possessed by the pre-emptor and the vendee respectively against the vendor

and to the vendor's obligation to offer the property in dispute to one of them in preference to the other before a sale actually takes place."

[8] Indeed, in his judgment in 91 P. R. 1909,³ the learned Judge went to the length even of doubting the correctness of decisions which had laid down that, in a pre-emption suit, the plaintiff, in order to succeed, must retain up to the date of the decree the qualifications which formed the basis of his claim to a superior pre-emptive right. Rattigan J. in his judgment in the aforesaid case formulated six propositions which he considered were well-established and could not be controverted, and based his opinion on those propositions. The fourth of these six propositions was stated by him as follows:

[9] "That at any time prior to decree, the claimant for pre-emption may lose his so-called right of pre-emption either because he has himself parted with the property by reason of the possession of which he claimed that right, or because the original vendee has transferred the property claimed to a person who has rights of pre-emption in respect thereof either equal or superior to those of the claimant, *Atma Ram v. Devi Dayal*, *Mohd. Ayub Khan v. Rure Khan* and *Khan v. Mahanda*. This point is conceded by the learned Chief Judge in his judgment in the present case, and I need not dilate upon it further, except to observe that in respect of such transfers by the vendee, the ordinary rule of *lis pendens* is apparently not applicable."

[10] Referring to these propositions Shah Din J. observed as follows:

[11] "Of the six propositions laid down by my learned brother at the commencement of his judgment, I accept without demur all, save and except the first part of the fourth proposition, namely, that at any time prior to decree the claimant for pre-emption may lose his so-called right of pre-emption, because he has himself parted with the property by reason of possession of which he claimed that right. This proposition is further on explained as meaning that the pre-emptor, who has an undoubted cause of action at the time of the institution of the suit, can lose his right to a decree, even after the institution of the suit, if he himself parts with the property by reason of which he claimed pre-emption; and this loss of right is said to be founded on the broad ground that the object of law in recognising a right of pre-emption is to retain property in the hands of persons who are more or less intimately connected with it and who, therefore, desire to keep out strangers."

[12] With respect I may say that there can be no question as to these opinions of the learned Judge being only the logical consequences of his views as to the nature of the pre-emptive right. That the questions involved in the two references were closely allied with each other and that the answer to either of them really depended on the answer to the question whether, having regard to the nature of the pre-emptive right, the pre-emptor, in order to succeed, had to prove his possession of a right better

than and superior to that of the vendee only at the date of the sale or also at the date of the suit and even when the suit came for final decision, was fully realised also by the other Judges constituting the Bench. Clarke C. J. in his judgment in 91 P. R. 1909³ observed as follows:

[13] "My judgment in Full Bench case No. 827 of 1907,² decides to a great extent the point referred on this appeal. . . . In that judgment I held that a vendee could not by a contemporaneous purchase defeat the rights of a pre-emptor, and it follows *a fortiori* that he cannot defeat them by a subsequent purchase whether prior or subsequent to the institution of the suit, a point which I also discussed in that judgment."

[14] Reid J.'s judgment simply adopted his reasoning in his judgment in 90 P. R. 1909.² He said:

[15] "I concur in the judgment of the learned Chief Judge, and for reasons recorded in my judgment in 90 P. R. 1909,² I concur with the learned Chief Judge in answering the question referred in the negative."

[16] It may also be observed that although the question referred to the Full Bench in 91 P. R. 1909³ was a narrow one and was limited only to the competency of a vendee to defeat a pre-emptor's suit by effecting an improvement in his position between the dates of the institution of the suit and of the decree, all the Judges, except Robertson J. who answered the reference in the pre-emptor's favour and against the vendee were definitely of the opinion that the vendee could not be permitted to improve his position even before the institution of the suit, some of them being inclined to hold, in agreement with Shah Din J. that even a subsequent deterioration in the plaintiff's own position could not defeat his suit.

[17] In I. L. R. (1942) Lah. 155⁴ a Full Bench of this Court disagreed with the view taken by the Full Bench of the Chief Court in 91 P. R. 1909,³ and held that the date of the sale was not the crucial date to determine the relative rights of the pre-emptor and the vendee, that a vendee could improve his status effectively right up to the adjudication of the suit against him, and that the acquisition made even during the pendency of the suit could arm the vendee with an effective weapon to destroy the pre-emptor's superior claim. The leading judgment of the Full Bench was written by my brother, Din Mohammad J. who after a very exhaustive and elaborate review of all the relevant authorities, dissented from the views express-

4. (41) 28 A. I. R. 1941 Lah. 433 : I. L. R. (1942) Lah. 155 : 197 I. C. 227 (F. B.), *Madho Singh v. James R. R. Skinner*.

ed by Chatterjee and Shah Din JJ. and agreed with the view of Rattigan J. The correctness of this Full Bench judgment was not disputed before us. In fact Mr. Badri Das, counsel for the appellant, expressly admitted the view taken in the aforesaid judgment to be correct and not liable to be called in question. Indeed, the view of the Full Bench has by now even received the imprimatur of the Provincial Legislature which in 1944 passed an Act with a retrospective effect, providing that, a vendee's right to defeat a claim for pre-emption of a person having pre-emptive right at the time of the sale, by acquiring property subsequent to such sale, the ownership whereof gives him a right of pre-emption at least equal to that of the plaintiff, must be confined to acquisitions made before the institution of the pre-emption suit and that he should not be allowed to defeat the plaintiff's suit by means of acquisitions made subsequent to the institution of such suit. The right of the vendee to successfully resist a plaintiff's suit for pre-emption on the strength of other property purchased by him between the date of the sale sought to be pre-empted and that of the institution of the pre-emption suit has, thus, received legislative recognition now and has been placed beyond the pale of controversy.

[18] It must, accordingly, be taken as well settled that a vendee can improve his position at any time between the date of the sale and that of the institution of the pre-emption suit. As pointed out by Rattigan J. in 90 P. R. 1909² and as conceded expressly by Shah Din J. and by necessary implication by the other Judges constituting the Full Bench, if a vendee can defeat a suit for pre-emption on the strength of acquisition of property made by him between the date of the sale in his favour and that of the institution of the pre-emption suit, there can be no reason why he cannot avail himself of an acquisition made by him simultaneously with the purchase of the property which is the subject-matter of the pre-emption suit. I am, therefore of the opinion that in view of the decision of the Full Bench in I. L. R. (1942) Lah. 155,⁴ and the subsequent legislative recognition of the principle laid down by that Full Bench, the majority decision in 90 P. R. 1909² cannot be said to lay down good law.

[19] In arguing the case on behalf of the appellant, Mr. Badri Das laid stress on the implications of the right of pre-emption viewed as a primary right, entitling the possessor of the right to an offer of the

property before the sale thereof to a third party, and relying on the provisions of S. 19, Punjab Pre-emption Act, urged that the right existed before and independently of the sale and could not, therefore, be defeated on the strength of a title acquired subsequent to the accrual of the cause of action which consisted in the vendor's failure to offer the property to the plaintiff before its sale. Although this view of the nature of a pre-emptive right was taken by some of the most eminent Judges who adorned the Chief Court Bench, it was never followed even by them in all its logical consequences. For example, in spite of holding him to be guilty of a breach of a legal obligation in selling the property without offering the same, in the first instance, to the possessor of the right, the vendor was never held liable for any redress in respect of such breach, the only relief open to the pre-emptor being to follow the property in the hands of the purchaser. A vendor was in fact not even considered to be a necessary party to a pre-emption suit. The Full Bench judgment in I. L. R. (1942) Lah. 155,⁴ the correctness whereof, as observed before, was not challenged by Mr. Badri Das, must, in any case, be deemed to have disapproved of this view which formed, to a very large extent, the foundation of Shah Din J.'s opinion as to the date of the sale being the only date for comparison of the respective qualifications of the plaintiff and the vendee, which opinion has been expressly dissented from in the aforesaid judgment. Indeed, the following observations by my brother Din Mohammad J. with which Tek Chand and Beckett JJ. concurred, clinch the question as to the existence of a pre-emptive right before, and independently of, the sale and seem to me to completely demolish Mr. Badri Das's argument :

(20) "In my view, the right of pre-emption does not exist independently of its exercise so as to invalidate transactions which take place in defiance of it. It is no doubt a right of preferential purchase, but so long as it is held in abeyance, it is ineffective altogether."

[21] In trying to show that the present case was not within the principle of the decision in I. L. R. (1942) Lah. 155⁴ Mr. Badri Das drew a distinction between a case where a vendee resists a pre-emption suit on the strength of a qualification acquired in consequence of purchase by him of an adjoining property subsequent to that of the subject-matter of the suit, and a case where he seeks to defeat the suit on the strength of his title to an adjoining property purchased

by him by means of the same sale-deed. He urged that, while in the former case, the previous owner of the property subsequently acquired by the vendee had, by reason of his ownership of such property, a right to pre-empt the sale which right, on the transfer of that property, passed to its present owner and furnished him with an effective weapon of defence, in the latter case the ownership of the adjoining property did not confer on its former owner any right of pre-emption in respect of the property in suit and could accordingly, not pass any such right to the purchaser. He founded this argument on the proposition that, while two adjoining properties vest in the same person, any one of them cannot be said to carry with it any pre-emptive right in respect of the other. The argument of Mr. Badri Das was one of the arguments on which Chatterjee J. based his judgment in 90 P. R. 1909.² With all respect I must say that Rattigan J. gave an effective reply to this argument by pointing out the difference between the position of a plaintiff suing to enforce a right of pre-emption and a vendee defending a suit brought to pre-empt the sale in his favour on the plea of possession of a qualification equal to that of the plaintiff. In the latter case all that the vendee is required to prove is that at the time an attempt is made to dislodge him from the bargain he owns some other property which clothes him with a qualification similar to that on the strength of which such attempt is made. That the reply of Rattigan J., was considered by him to be convincing and satisfactory clearly appears from the judgment of Shah Din J., who, while he noticed both the original argument and the reply, refrained from any criticism of the latter and made no attempt to derive any assistance from the argument in support of his opinions.

[22] After giving most careful thought to the question, I am of the opinion that a vendee, in a suit brought to enforce on the ground of vicinage a right of pre-emption in respect of one of the properties purchased by him, can successfully resist the suit on the strength of his title to an adjoining property conveyed to him by means of the same sale deed. In my judgment, therefore, the plaintiff's suit has been rightly dismissed by the Courts below. I would accordingly dismiss this appeal with costs.

Din Mohammad J. — I agree.

Ram Lall J. — I agree.

D.S./D.H.

Appeal dismissed.

[Case No. 68.]

A. I. R. (33) 1946 Lahore 350

ABDUL RASHID AND MAHAJAN JJ.

Gurditta Mal & others — Appellants
v.

Chauranji Lal & others — Respondents.

Second Appeal No. 1054 of 1944, Decided on 5th December 1945, referred by Din Mohammad J., D/- 14th March 1945.

Custom (Punjab) — Adoption — Adoption of person after his upanayana ceremony in natural family is valid.

As regards adoption, the rule prevailing in the Punjab is akin to the rule prevailing in Western India. The strict rules of Hindu law with respect to the age and *Janeo* ceremony of the adoptee are modified by rules of custom and therefore are merely recommendatory. Hence the adoption of a person, even after his *upanayana* ceremony is performed in the natural family, is valid: ('24) 11 A. I. R. 1924 P. C. 113, *Rel. on*; *Case law referred.* [P 353 C 1, 2]

D. N. Aggarwal and Hans Raj Sachadeva —
for Appellants.

Shamair Chand and Harbans Singh —
for Respondent No. 1.

Mahajan J. — One Ram Lal Brahman was the last occupancy tenant of the land in suit. On his death, the holding was mutated in favour of defendant Charanji Lal who claimed for himself the status of an adopted son of the deceased. The plaintiffs landlords brought the present suit for possession of the holding, on the ground that Ram Lal having died without any heirs the occupancy rights came to an end and they were entitled to a decree for possession. The defendant pleaded a valid adoption under Hindu law and alleged that he was an heir to the last occupancy tenant under the provisions of S. 59, Punjab Tenancy Act, being his male lineal descendant. Three material issues were framed in the case : (1) Whether defendant 1 is the adopted son of Ram Lal deceased? (2) Whether the adoption in dispute was made under Hindu law? If not, what is its effect? (3) Whether the parties are governed by rules of custom as alleged in the plaint?

[2] In the plaint, the plaintiffs alleged that Ram Lal deceased in matters relating to adoption was governed by the rules of agricultural custom. No evidence, however, was led in support of the alleged rule of custom. On the other hand, it was found that Ram Lal himself had succeeded to the occupancy holding as an adopted son of one Radha Ram. This could only have happened if he had himself been adopted under Hindu law. It was further held

proved that some sixteen years before the suit adoption ceremonies in connection with defendant's adoption were performed in the presence of the brotherhood. The physical act of giving and receiving with the intention of transplanting him from one family to the other was duly performed, a ceremony in the nature of Datta Homam was gone through, and subsequent to the adoption the adoptee was twice married by his adoptive father and lastly a registered deed of adoption was executed by him in his favour.

[3] The trial Judge in these circumstances held that the evidence in support of the factum of adoption under Hindu law was quite conclusive. It was argued that as the adoptee was a married person and had undergone the *upanayana* ceremony, he was incapable of being adopted under the Hindu law. The trial Judge negatived this contention. He held that there was no evidence to indicate that the adoptee was a married person at the time of the adoption. As regards the *upanayana* ceremony, the learned Judge reached the conclusion that no such restrictions as prevail in provinces that follow strict rules of Hindu law could be applied to the Punjab where adoption even without the performance of religious ceremonies was a perfectly valid adoption. In the result, the plaintiffs' suit was dismissed with costs. The decree dismissing the plaintiffs' suit was affirmed on appeal by the Senior Subordinate Judge, Hoshiarpur. The plaintiffs having been unsuccessful in the two Courts below preferred a second appeal to this Court. The learned Single Judge before whom the appeal was laid in the first instance observed that the question whether in the Punjab the adoption of a Hindu after the sacred thread ceremony is valid under the Hindu law requires an authoritative decision as there is no clear authority on the point so far. He, therefore, referred the case to a Division Bench for disposal.

[4] It can now be said without much hesitation that the law is settled in provinces following the Benares School, that in the case of the three higher classes of Hindus the adoption of a person is valid if made before *upanayana* and if he belongs to the Shudra caste before marriage. In Madras an exception has been engrafted on the general rule according to which the adoption of a boy of the same 'gotra' as the adoptive father, even if his *upanayana* ceremony has been performed in the family of his birth is valid but not after his marriage. In Western India a

man may be adopted at any age though he may be married and have children whether he belongs to the same or another 'gotra' and this rule applies to all the four castes. In Bombay a man can adopt a son older than himself, on the ground that the rule as to age is only recommendatory. The question is whether in the Punjab the strict rule of Benares school of Hindu law prevails or whether in this custom-ridden province restrictions as regards age and *Janeo* ceremony of the adoptee are merely recommendatory, and that strict Hindu law stands modified by a universal rule of custom to the effect that the adoption of a person before marriage even if *upanayana* ceremony has been performed in the natural family is valid.

[5] It was conceded by the learned counsel for the appellant that no reported case could be discovered in which adoption among the three higher classes of Hindus in this province had ever been set aside, on the ground that it had been made after the *upanayana* ceremony had been performed in the natural family. So far as I am aware, the plea that an adoption under Hindu law as prevailing in the Punjab is invalid because it was made after the *upanayana* ceremony had been performed in the natural family has seldom been taken. Restrictions as to the age of the adoptee as laid down by the Benares school of Hindu law or by Dattaka Mimansa or Dattaka Chandrika have never been strictly followed in this province. On the question of the eligibility of the adoptee, Hindu law has been varied by a universal rule of custom. Under pure Hindu law, a daughter's son or a sister's son cannot be validly adopted, but in this province it is universally accepted that pure Hindu law has been modified by custom in that particular. Hindu law on the point of the right of representation in matters of collateral succession again has been modified by a general rule of custom.

[6] Reference in this connection may be made to a Bench decision of this Court in A. I. R. 1940 Lah. 431.¹ That a son cannot claim partition of the coparcenary property as allowed by Hindu law during the life-time of his father has again become a rule of universal custom in this province. 105 P.R. 1917² is the leading case on this subject. In the

1. ('40) 27 A.I.R. 1940 Lah. 431 : I.L.R. (1941) Lah. 620 : 190 I. C. 801, Diwan Chand v. Beii Ram.

2. ('18) 5 A.I.R. 1918 Lah. 291 : 105 P.R. 1917 : 43 I.C. 657 (F. B.), Hari Kishen v. Chandu Lal.

matter of adoption, it has been laid down in a considerable number of decisions of this Court that even agriculturists following customs can make formal adoptions of a son under Hindu law. They are not, however, governed by the limitation as to age of the adoptee laid down in pure Hindu law. A Full Bench of this Court considered this question in 11 Lah. 481.³ This was a case of Brahmans belonging to the districts of the old Delhi territory. Adoption in this case had been made by the deceased occupancy tenant of a married person who had sons. The question arose whether that adoption was valid under Hindu law prevailing in the Punjab and whether the adopted son could be held to be a male lineal descendant of the deceased within the meaning of that expression in S. 59 (1) (c), Punjab Tenancy Act. At page 499 of the report the following relevant observations occur :

[7] "According to cl. (a) of S. 5, Punjab Laws Act, 'adoption' is one of the matters in which custom is the primary rule of decision, and in this as in many other matters custom has prevailed to a large extent over personal law in this province. There can be no doubt that 'formal adoption' is permitted by the personal law of the Hindus, but amongst agricultural tribes, the appointment of an heir under custom is far more common and 'formal adoption' is very rare. But when such formal adoption does take place, there seems to be no reason why its validity for the purposes of S. 59, Punjab Tenancy Act, should not be recognised merely because the adoption is not in accordance with strict Hindu law. For, the personal law with reference to which the expression 'male lineal descendant' has to be interpreted is not strict Hindu or Mahomedan law : but the personal law of the parties concerned. If the parties are Hindus or Mahomedans, the personal law will be not necessarily strict Hindu or Mahomedan law, but Hindu or Mahomedan law as modified by custom. In the present instance, a married person, who had himself a son, was adopted. It is not disputed that such an adoption will be invalid under strict Hindu law, but Hindu law has been modified by custom in this respect in the present instance and according to that custom such an adoption has been found to be valid amongst the parties concerned. In other words, there has been in this instance a valid adoption according to the 'personal law' of the parties concerned."

[8] As I have already pointed out, this was a case of Brahmans and, in their case, the adoption of a married person with sons was held valid. A similar question was considered by a Bench of this Court in 13 Lah. 126.⁴ In that case it was held that among the Kaistha of Rohtak the Mitakshara law had been varied by custom to this extent that the adoption of a daughter's son was

valid and that under Hindu law the adopted son became the male lineal descendant of the adoptive father. At page 135 of the report it was observed :

[9] "In some respects, however, the full dictates of the Mitakshara law requisite for a valid adoption are not observed and particularly the prohibition against the adoption of a daughter's or a sister's son is not always observed."

[10] If I may say so, it can also be said with equal force that the prohibitions in respect of the age of the adoptee have never been recognised as invalidating an adoption in this province. The question was considered by their Lordships of the Privy Council in 5 Lah. 200,⁵ a case that arose among the Kashmiri Pandits of Delhi. In that case the adoption was sought to be declared invalid on the ground that it had been made after the *upanayana* ceremony had been performed in the natural family. It may be pointed out that custom modifying Hindu law in that particular respect had not been pleaded in the case and no evidence of custom had been led to prove that Hindu law stood modified on that point in Delhi. Their Lordships, however, considered that by the treatment of the adopted son as such in the adoptive family an inference must be drawn that the adoption was a valid one even though it had been performed after the *upanayana* ceremony. At page 210 of the report the following relevant observations occur :

[11] "After a careful consideration of the evidence their Lordships have come to the conclusion that Shambhu Nath was validly adopted by Ram Chand. His adoption was recognised as valid by the Biradari and by the friends of the family, and so far as appears its validity was not questioned by any one from 1896 until the present dispute arose in 1913. When Ram Chand died, his brother Hari Nath and two elder sons of Hari Nath were living, but it was Shambhu Nath who performed the funeral obsequies of Ram Chand and of Ram Chand's widow, and on Ram Chand's death Shambhu Nath succeeded him as the Guru. It was Shambhu Nath who gave Mt. Durga Devi away in marriage. It was Shambhu Nath who paid the not inconsiderable expenses of the marriage."

[12] In my view, these observations have an opposite application to the facts of the case. The adoption of the defendant by Ram Lal was made sixteen years before the suit. The adoptee lived with his adoptive father all this time. He was married twice by him. The brotherhood and all the relations had recognised him as an adopted son. He inherited the patrimony of Ram Lal without objection being made by any

3. ('30) 17 A.I.R. 1930 Lah. 764 : 11 Lah. 481 : 126 I.C. 161 (F. B.), *Sabha Chand v. Piare Lal*.

4. ('31) 18 A.I.R. 1931 Lah. 546 : 13 Lah. 126 : 132 I.C. 481, *Baldeo Sabai v. Ram Chandar*.

5. ('24) 11 A. I. R. 1924 P. C. 113: 5 Lah. 200: 51 I. A. 182: 80 I. C. 965 (P. C.), *Durga Devi v. Shambhu Nath*.

one of his near or remote collaterals. Even up to date no member of his brotherhood has challenged the adoption. It is only the landlords who have come forward to dispossess him from the occupancy holding, on the ground that the adoption was invalid because it was made after the *upanayana* ceremony of the defendant had been performed in the natural family. It will be pertinent to point out that this plea was not taken at all in the case. On the other hand, the plaintiffs' own case was that the parties were governed by custom and the appointment had been made under customary law. This suggestion by itself is sufficient for holding that Hindu law in any case in this particular matter had been varied by custom so far as the parties to the present case are concerned. I am, therefore, of the view that the rule prevailing in the Punjab on this question is akin to the rule that prevails in Western India. The North-West seems to follow in matters of adoption rules that prevail in the western part of this country. The strict rule of the Benares school prevailing in the U. P. and in Bengal has never been applied here.

[13] Mr. Aggarwal placed particular emphasis on a recent decision of a Bench of the Calcutta High Court in I. L. R. (1944) 1 Cal. 566.⁶ In that case Rau J. considered this question at great length. He reached the conclusion that amongst the Brahmans of Bengal an adoption of a boy whose *upanayana* ceremony had been performed in the natural family was invalid according to the law that prevailed there. Towards the concluding portion of the judgment, he observed that in Madras several exceptions have been engrafted upon the rule on the basis of custom and according to such customs the adoption of a boy of the same *gotra* even after his *upanayana* had been performed in the family of birth is valid but not after his marriage. In Western India, the view taken from the beginning is different and it does not recognise any restriction arising out of age or initiatory ceremonies in the family of birth. So far as this province (i. e., Bengal) is concerned, it may be said that the view has been uniformly held that the adoption of a son belonging to the twice-born classes after he is invested with sacred thread in the family of his birth is not valid. This decision must therefore be limited in its application to the Province of Bengal. In the Punjab whatever decisions

exist support the view that the adoption of a boy after *upanayana* is a valid one. That being so, the Bench decision of the Calcutta High Court can afford no assistance to the case of the appellants. Both the Courts below have taken the view that the circumstance that the adoption was made after the *upanayana* ceremony had been performed in the natural family did not invalidate it. I am of the view that their decision on this point is right. I would accordingly uphold it and would dismiss this appeal with costs.

Abdul Rashid J. — I agree.

N.S./D.H.

Appeal dismissed.

[Case No. 69.]

* **A. I. R. (33) 1946 Lahore 353**

FULL BENCH

ABDUL RASHID AG. C. J., MAHAJAN AND
ACHHRU RAM JJ.

Rabidat—Plaintiff—Appellant

v.

*Mt. Jawali, deceased represented by Mt.
Darkan and others — Defendants
— Respondents.*

Second Appeal No. 685 of 1944, Decided on 1st April 1946, from Order of Reference by Achhru Ram J., D/- 11th June 1945.

* (a) Hindu law — Alienation — Widow — Power of widow to alienate her husband's property for religious or charitable purposes not enjoined as obligatory by texts, extent of, stated—Alienation need not be made with avowed object of conferring spiritual benefit on husband—Considerations to be taken into account in determining validity of alienation stated.

In every case where a gift or any other transfer by a Hindu widow is sought to be supported on the ground that, although not made in or for the performance of acts or observances which are regarded as essential religious obligations, the transfer was beneficial to the soul of her deceased husband, two questions fall for decision. The first question is whether the transfer has been made for a religious or charitable purpose which is supposed (by Shruti i. e., the Scripture, Smriti, i. e., text-books or *sadachar* i. e., rules of conduct recognised generally by the society) to conduce to the spiritual welfare of the husband. The second question is whether the property covered by the transfer constitutes a small or reasonable portion of the entire estate. In dealing with the first question, the Court should have regard to the purpose for which the gift has been made, or to which the proceeds of the transfer have been applied, and the religious merit which, according to Hindu religious notions, attaches to the same. The question to be determined in each case is whether the purpose is one which is regarded by the Hindu religion, or the particular sect to which the deceased belonged, as one calculated to confer spiritual benefit on him, and not whether the widow herself regarded it as efficacious to confer such benefit. If the answer to this question is in the affirmative, the act must be upheld as conducive to the spiritual benefit of the previous owner, whether or not the widow has

6. ('44) 31 A. I. R. 1944 Cal. 265 : I. L. R. (1944) 1 Cal. 566, *Sura Bala Debi v. Sudhir Kumar Mukherjee*.

purported to do it with the object of conferring such benefit on him. If, on the other hand, the nature of the act itself is such that, according to the common notions of Hindu religion, it cannot confer any spiritual benefit on the husband, whether or not it confers such benefit on the widow herself, any kind of declaration by the widow as to the act having been intended by her to confer spiritual benefit on the husband will not alter its nature and make it conducive to his spiritual welfare. In the generality of cases, although possibly not invariably, pious acts done by the widow are supposed to conduce to the spiritual welfare of both. An important test to apply, in order to find out if a particular act is of this description, is to see, if the act is one which could have been done by the husband himself during his own lifetime to acquire religious merit, or is one which has been expressly recommended by the text books to be done by a widow for the benefit of the husband's soul. Another useful test may be the occasion on which a particular act is done. It is either the nature of the act or the occasion on which it is performed that is the determining factor in deciding whether an alienation made in or for doing the act is to be upheld as one calculated to conduce to the spiritual benefit of the husband and not the declaration made by the wife herself as to the purpose or object of the act or the transfer.

[P 378 C 2; P 379 C 1]

Consequently, a gift by a Hindu widow of a moderate or small portion of her deceased husband's estate in her possession for religious or charitable purposes, not enjoined as absolute spiritual necessities, need not, in order to be valid, be expressly made for spiritual welfare of husband. *The contrary observations in ('24) 11 A. I. R. 1924 Lah. 137 are not correct ; Case law discussed.*

[P 379 C 2]

Hindu Law —

('40) Mulla, Page 175, S. 181A.

('38) Mayne, Page 779, Para. 644 and Page 781, Para. 645.

(b) Hindu law — Alienation — Widow — Alienation by widow of small or reasonable portion of her husband's property for religious or charitable purposes — What is reasonable portion depends on facts of each case — One-fourth portion of husband's entire property held to be a reasonable portion.

Whether the property actually transferred for charitable or religious purposes of the type sanctioned by the law is, in any particular case, no more than a reasonable or a moderate portion of the entire estate of the husband, it is not possible to lay down any absolute rule of universal application. Each case must be decided with reference to its own facts. In each case the Court will be called upon to consider the extent of the estate in the possession of the widow, the number of persons she, by law, is bound to maintain or to provide for, the nature of the religious or charitable act proposed to be performed, and possibly also the precise relationship to the deceased of the presumptive reversioners. Where the estate held by the widow is very large and yields very considerable income a comparatively smaller proportion of the entire estate may be deemed to be such a reasonable or moderate portion as can be validly transferred by her for pious purposes not amounting to spiritual necessities. Where, however, the estate is small, the transfer of a comparatively larger proportion may have to be upheld. Similarly,

where the number of dependents is large, the transfer of a very small proportion of the estate may be permissible, whereas in cases where the number of dependents is very small, a large proportion of the estate may justifiably be alienated. The texts have repeatedly forbidden what is called *apahara* of the property which literally means 'theft', but which has been interpreted to signify 'waste'. These texts may be taken to furnish a useful guide and the Court may in a given case reasonably consider whether or not the transfer amounts to an *apahara* of the husband's property designed to destroy the reasonable expectations of the reversioners or is a *bona fide* arrangement or a *bona fide* transfer for a genuinely pious purpose.

[P 379 C 1, 2]

Held, that in the case before the High Court a gift to a *Gaushala* to the extent of one-fourth or even a little more of the husband's estate could be regarded as small or moderate portion and was therefore valid : *Obiter dictum to the contrary in ('24) 11 A. I. R. 1924 Lah. 137, must be deemed to be no longer law.*

[P 379 C 2]

Hindu Law —

('40) Mulla, P. 178 Pt. (c).

('38) Mayne, P. 780 Pt. (t).

(c) Custom (Punjab) — Widow — Power to alienate small portion of her husband's estate for charitable or religious purposes—Absence of custom on subject—Widow's power should be taken to be same as under Hindu law.

In cases where there is a gap in custom, such gap must be filled in by reference to the personal law of the parties. There being no custom on the subject of gifts by widows either *simpliciter* or for religious or charitable purposes, reference must necessarily be made to the principles of Hindu law governing the subject.

[P 380 C 1]

The position of a widow and the nature and the incidents of her tenure under the customary law of the Punjab are exactly identical with those under the Hindu law : ('29) 16 A. I. R. 1929 Lah. 295; ('22) 9 A. I. R. 1922 Lah. 217 and ('46) 33 A. I. R. 1946 Lah. 180 (F. B.), *Rel. on.* [P 380 C 1]

Consequently, the powers of a widow to make a gift of a small or moderate portion of her husband's estate for charitable or religious purposes must be taken to be the same under the custom as under the Hindu law.

[P 380 C 1]

F. C. Mital—for Appellant.

D. N. Aggarwal—for Respondents.

ORDER OF REFERENCE

Achhru Ram J. — The parties to this appeal are Gaur Brahmans of the village of Garhi Brahmanan, in Sonapat Tahsil. 9 *bighas* and 16 *biswas* of land, which is the property in dispute, originally was *shamilat* of the village. In 1910 at a partition of the *shamilat* it was allotted to Mt. Dhapan, mother, and Mt. Jowali, widow of one Hardit, a Brahman of the village, who had died childless in the year 1906 and on whose death the land held by him had been mutated in the names of the aforesaid Mt. Dhapan and Mt. Jowali. After partition, the two ladies had the land in dispute broken up. Some time later, Mt. Dhapan gifted her share of the suit land, presumably

along with the rest of the land standing in her name, to her daughter-in-law, Mt. Jowali. The latter gifted the land in suit to the local Gaushala. Ravidat, a collateral of Hardit, brought a suit for a declaration to the effect that the gift of the suit land to the Gaushala should not affect his reversionary rights after the death of Mt. Jowali. The suit has been dismissed by both the Courts below on the finding that according to the custom applicable to the parties gift of a small portion of her husband's estate by a widow for religious and charitable purposes was valid and that 9 *bighas* and 16 *biswas* of land out of a total estate of approximately 42 *bighas* was a small portion of such estate which had been therefore validly gifted by Mt. Jowali to the Gaushala, the gift being obviously one for a religious and charitable purpose. The plaintiff has come in second appeal to this Court.

[2] It was contended by Mr. Faqir Chand Mittal, the learned counsel for the appellant, that the land gifted was neither a small nor a reasonable portion of the entire estate and, in any case, in the absence of finding that the gift had been made for the spiritual benefit of the deceased husband of the donor, it could not be upheld merely because it was made for a religious or charitable purpose.

[3] In upholding the gift, the Courts below had relied on the answer to question No. 108 of the Customary Law of the Delhi district, on Exception 6 to para. 59 of Rattigan's Digest of Customary Law, and on the judgment of a Division Bench of this Court in 10 Lah. 613.¹

[4] Question No. 108 in the Customary Law of the Delhi district reads as follows :

(5) "State the facts necessary to constitute a valid gift. Can a gift be conditional or implied? Is delivery of possession essential? Must the gift be made in writing?"

[6] The answer to this question is in the following terms :

[7] "A gift is generally made for religious and charitable purposes and the *sankalap* ceremonies among the Hindu make the gift valid. A gift of this kind may be made verbally; it need not be made in writing."

[8] I do not find it possible to read in the above statement of custom any rule conferring on a widow the power to make a gift of either the whole or a part of her husband's immovable property for religious and charitable purposes. The statement that a gift is generally made for religious and charitable purposes is nothing more than a mere statement of fact describing the circumstances

under which and the purposes for which gifts are generally made in the District. *Sankalap* ceremonies constitute only the method according to which a gift may be made. If the lower Courts' interpretation of the answer to this question were accepted as correct, it will mean that the custom of the District recognises in a widow wholly unrestricted power to gift away the whole of the husband's estate because, neither in the question nor in the answer, is there any limitation introduced as to the gift being required to be made of a small or a reasonable portion of the estate. The question of the powers of a widow over property inherited by her from her husband is really dealt with in question No. 55 and not in question No. 108. Question No. 55 runs as follows :

[9] "Question 55.—If the estate devolves upon the widow, define her interest therein. What rights has the widow to alienate by sale, gift, mortgage, or bequest?"

(1) Are there any special circumstances or expenses under or on account of which alienation is permissible?

If so, what are these?

(2) Is there any distinction in respect of movable or immovable, ancestral or acquired property or in respect of alienation to the kindred of the deceased husband?

(3) Supposing alienation to be permissible, whose consent is necessary to make it valid?"

[10] The answer to the above question runs as follows :

[11] "If the estate devolves upon the widow, she remains in possession of it for life or till re-marriage. She can alienate, as she pleases, any of the movable property which has devolved on her from her husband, but in respect of immovable property, be it ancestral or acquired, she cannot alienate it in any circumstances by sale, gift or bequest. She can, however, mortgage it for necessary and unavoidable expenses."

[12] I am, therefore, of the opinion that the Customary Law of the District does not contain any provision helpful to the respondent or justifying the decision given by the Courts below.

[13] As for exception 6 to para. 59 of Rattigan's Digest of Customary Law, it must, in the first instance, be observed that from its language para. 59 appears to cover only cases of alienations by male proprietors. The paragraph runs as follows:

[14] "Ancestral immovable property is ordinarily inalienable (especially amongst Jats residing in the central districts of the Punjab), except for necessity or with the consent of male descendants, or, in the case of a sonless proprietor, of his male collaterals. Provided that a proprietor can alienate ancestral immovable property at pleasure if there is at the date of such alienation neither a male descendant nor a male collateral in existence."

[15] It is well-known that in the case of a widow non-ancestral property is also inalien-

1. (29) 16 A.I.R. 1929 Lah. 295 : 10 Lah. 613 : 118 I. C. 449, Thakar Singh v. Mt. Uttam Kuar.

able and that she cannot alienate the property inherited by her from her husband even if at the date of the alienation no male collateral or male descendant is in existence. In case of an alienation by a widow even the cognatic relations of the husband are entitled to impugn such alienation and on failure of all other heirs of the husband even the Crown has been held to possess such a right. The context and the phraseology can leave no doubt in one's mind as to the paragraph being intended to provide a rule only in respect of the power of alienation of a male proprietor governed by Customary law. The rule stated in the paragraph is no more than a mere reiteration of the principle enunciated in the Full Bench judgments, 107 P. R. 1887² and 73 P. R. 1895.³ Exception 6 under this paragraph, providing that gifts for pious or religious purposes to a small extent, but not when embracing the bulk of the donor's estate, are generally held to be allowable, must therefore be held to be limited in its scope to cases of males. There is no doubt that in Mr. Rustomjee's Edition of Rattigan's Customary Law, a paragraph has been added under Exception 6 as it originally appeared in the book compiled by Sir William Rattigan himself, and subsequently revised by Sir Henry Rattigan, in which it is stated that under custom, a gift by a widow of a small portion of her husband's estate for pious and religious purposes is valid and binding on the reversioners. This paragraph, however, is expressly based on the view of law taken in 10 Lah. 613¹ and refers to the observations at p. 644 of the report. It is interesting to observe that the passage at p. 644 to which reference has been made by Mr. Rustomjee is, in its turn, based on Exception 6 to para. 59 in Rattigan's Digest and the authorities cited therein. I have carefully examined all these authorities and find that not one of them deals with a case of gift by a widow and all are cases of gifts made by male proprietors.

[16] The powers of female holders in the matter of alienating by sale, gift or mortgage the property held by them are dealt with in paras. 62, 64 and 65 of Rattigan's Digest. Paragraph 62 reads as follows:

[17] "Every person having an interest in property whether absolute or as life tenant (e. g., a widow, a daughter or a mother) can sell or mortgage such property for a necessary purpose."

[18] Paragraph 64 reads as follows:

[19] "Except as provided in para. 39 or para. 62

no female in possession of immovable property acquired from her husband, father, grandfather, son or grandson, otherwise than as a free and absolute gift can permanently alienate such property."

[20] Paragraph 39 referred to in this paragraph deals with adoption or appointment of an heir by a widow either under her husband's express authority or with the consent of her husband's kindred. It, therefore, follows that except making an adoption or appointment of an heir in the manner provided for in para. 39 or selling or mortgaging such property for a valid necessity, a widow has got no power to dispose of the immovable property inherited by her from her husband.

[21] Paragraph 65 provides:

[22] "A person dealing with a female proprietor (a) is presumed to know that her estate is merely a limited one; and (b) is bound to enquire into the necessity for the alienation and to satisfy himself as a reasonable man that it is of such a character as would justify the act, but he is not required to see to the application of the money."

[23] In 10 Lah. 613¹ we do find the following observations at pp. 643 and 644:

[24] "It was contended for the appellants that there is no proof of the recital of the deed that directions to gift the property were given by Dhanna Singh at the time of his death. Even if this recital be held to be unproved, there is no doubt that under Customary law a gift by a widow of a small portion of her husband's estate, for pious or religious purposes, is valid and binding on the reversioners."

[25] As pointed out above, in support of this dictum the only authority relied on is Rattigan's Digest, Para. 59, Exception 6, and the authorities cited therein. As I have said before, the relevant passage in Rattigan's Digest and the authorities mentioned therein do not appear to relate at all to the case of a widow and therefore cannot support the broad proposition as to the rule of Customary law laid down in the aforesaid judgment. No reference appears to have been made to the really relevant provisions contained in Rattigan's Digest.

[26] Custom has always made a distinction between powers of a male and a widow and it seems to be at best questionable whether on the mere analogy of the power of a male proprietor to gift away a portion of his ancestral property for religious and charitable purposes a widow could be held to possess the same power in respect of immovable property inherited by her from her husband.

[27] After giving my very careful consideration to the subject, I find myself unable to discover either in the general Customary law or in the Customary law of the particular District any rule empowering a widow to

2. ('87) 107 P.R. 1887 (F.B.), *Gujar v. Sham Das*.

3. ('95) 73 P.R. 1895 (F.B.), *Ramji Lal v. Tej Ram*.

make a gift of any portion of her husband's estate for religious or charitable purposes. I must also say that I have not been able to discover anything against her possessing such a power except in so far as that may be deemed to be implicit in paras. 62, 64 and 65 of Rattigan's Digest.

[28] If we are unable to find any rule of custom one way or the other on the subject, we shall undoubtedly have to look to Hindu law for guidance. Apart from the ordinary rule that in cases where there is a gap in custom such gap must be filled up by reference to the personal law of the parties, it is well settled that the respective rights of a widow in possession of her husband's estate and her reversioners under the Punjab Customary law are analogous to those under Hindu law. Reference may, in this connection, be made, amongst other authorities, to 10 Lah. 613¹ and 5 Lah. 450.⁴ Under Hindu law, religious and charitable acts are divided into two classes *nitya karama* or indispensable religious duties and *kamya karamas* or optional religious acts. The obsequial ceremonies of the husband fall under the first category. The acts covered by this category are those which the text regards as essential and obligatory, with reference to these acts, the powers of a Hindu female who holds the estate are very wide and if the income of the estate or the estate itself is not sufficient to cover the expenses, she is entitled to sell the whole of it. As regards the second class of acts, which are regarded as pious acts in themselves carrying with them some religious merit, a widow can alienate a moderate or small portion of the estate, provided the religious or charitable acts are of such a nature that they may be supposed to conduce to the spiritual welfare of the deceased owner of the estate.

[29] While the rule of law as stated above may be taken to be fairly well established some conflict does appear to have arisen as to whether a gift or other alienation by a female holder of a small or moderate portion of the estate, in order to be valid, must expressly purport to be made for the spiritual welfare of the deceased owner of the estate or it is enough that the religious or charitable purpose for which the gift has been made, or the religious or charitable act to perform which the alienation has been effected, is such as is recognised by Hindu religious sentiments as being conducive to the spiritual benefit of the deceased. In the leading Privy

Council judgment dealing with the subject in 8 M. I. A. 529⁵ their Lordships have stated the rule at pages 550 and 551 of the report as follows:

[30] "It is admitted, on all hands, that if there be collateral heirs of the husband, the widow cannot of her own will alien the property except for special purposes. For religious or charitable purposes, or those which are supposed to conduce to the spiritual welfare of her husband, she has a larger power of disposition than that which she possesses for purely worldly purposes."

[31] In some cases that came up before the Indian Courts subsequent to this pronouncement of their Lordships, in which it became necessary to interpret the above quoted dictum, it was held that the alienation must be avowedly made by the widow for the spiritual benefit of the husband. One of these cases was that in 4 ALL. 482.⁶ In that case Mt. Durga Dai, the widow of one Ram Kishen, made a gift of the house inherited by her from her husband to her family priest about sixteen months after the death of the husband. In the instrument of gift, the gift was described as made in honour of the god Vishnu. There was no recital of its having been made for the spiritual benefit of Ram Kishen. On a suit brought by Mt. Puran Dai, a daughter of Ram Kishen, after the death of Mt. Durga Dai, the gift was set aside on the ground that it had not been made to benefit Ram Kishen in his after state but was in fact a gift made by the widow herself as an offering to a favoured idol for her own special credit in spiritual advantage. For some time, this view was accepted in all the High Courts where the question arose for decision. A discordant note was, however, struck by a Division Bench of the Calcutta High Court in 43 Cal. 574.⁷ Sir Asutosh Mookerjee who wrote the judgment, relying on a passage in Prannath Saraswati's Lectures on the Hindu Law of Endowments pointed out that the distinction drawn between acts of which the religious merit was solely acquired by the female heir and acts of which the religious merit accrued to the deceased or was shared by the female heir with him was not supported by the texts in the case of the widow, though it might be valid in the case of the female heirs such as the daughter or the mother. The reason for thus distinguishing the case of a widow from that of other female heirs was, on the authority of certain texts of

5. (1859-61) 8 M. I. A. 529 (P.C.), Collector of Masulipatam v. Cavalry Vencata Narrianapah.

6. ('82) 4 All. 482, Mt. Puran Dai v. Jai Narain.

7. ('16) 3 A.I.R. 1916 Cal. 792 : 43 Cal. 574 : 31 I. C. 433, Khub Lal Singh v. Ajodhya Misser.

4. ('22) 9 A. I. R. 1922 Lah. 217 : 5 Lah. 450 : 74 I. C. 644, Govinda v. Nandu.

Vrihaspati and Katyayana quoted in the Dayabhaga and Viramitrodaya, stated to be the fact of the husband and the wife participating in the effects of good and evil actions of each other and this mutual relation being not dissolved by the death of either party. The view taken thus was that in the case of a widow every religious or charitable act done by her must be supposed to conduce to the spiritual welfare of her husband and must therefore be taken to justify an alienation of a moderate portion of his property in her hands. In this view of the law, leases granted by the widow in that case for raising money to be spent on the excavation of a tank and erection of a wall in connection with a temple built by the husband shortly before his death were upheld.

[32] The above mentioned judgment of the Calcutta High Court was cited with approval in the judgment of a Division Bench of the Allahabad High Court in 41 ALL. 130,⁸ in which a gift made by a Hindu lady of a small portion of the property inherited by her from her husband to certain priests of the temple of Jagannath, immediately after her return from a pilgrimage, and in redemption of a promise made during such pilgrimage, was held valid. However, another Division Bench of the same Court in 43 ALL. 463⁹ stuck to the view taken in 4 ALL. 482⁶ and adhered to the interpretation placed there on the dicta of the Judicial Committee in 8 M. I. A. 529⁵ and declined to accept the view that in the case of a widow a pious or charitable act which could be supposed to conduce to her own spiritual welfare should be necessarily supposed to conduce also to her husband's spiritual welfare. It was pointed out that although the proposition appeared to have been looked at not with disfavour by the learned Judges who decided Khub Lal Singh's case, it was not possible to go so far as to say that they had accepted it. It was further observed, that whatever its application to persons governed by the Dayabhaga might be, it did not appear to be a doctrine applicable to persons governed by the Mitakshara law. According to the view of the learned Judges, under the Mitakshara law, though it was obvious that an act done by a widow supposed to conduce to the spiritual benefit of her husband would

confer spiritual benefit on herself, the converse did not follow and an act supposed to conduce to the spiritual benefit of herself could not merely on that account be supposed to confer spiritual benefit on her husband. With all respect, I do not find it possible to agree that the learned Judges who decided 43 Cal. 574⁷ did not themselves accept the proposition that a religious or charitable act done by a widow which could be supposed to conduce to her spiritual welfare would necessarily confer spiritual benefit on her husband. The language used by their Lordships does not seem to leave any doubt as to their meaning. Nor am I able to subscribe to the proposition that there is, or ought to be, any difference between cases governed by the Dayabhaga and those governed by the Mitakshara in so far as the applicability of this doctrine is concerned. So far as I am aware, there is no difference between the two schools respecting the restrictions attaching to the estate of a Hindu widow succeeding her husband, nor is there any warrant for the assumption that the approach of the two schools to the question of the husband and the wife participating in the effects of good and evil actions of each other is not the same. The two references to the text of Dayabhaga in the judgment in 43 Cal. 574⁷ are really not reference to something said by Jimut Wahan (the author of Dayabhaga itself) but to the texts of Vrihaspati and Vyasa quoted by him, which are of incontestable authority even in the Mitakshara school. The full text of Vrihaspati quoted in cl. (1), S. 1 of Chap. 11 of Dayabhaga is as follows :

[33] " Vrihaspati says, 'In scripture and in the code of law, as well as in popular practice, a wife is declared by the wise to be half the body of her husband, equally sharing the fruit of pure and impure acts. Of him, whose wife is not deceased, half the body survives.'"

[34] The full text of Vyasa quoted in cl. 43 of the same section of the same chapter is as follows :

[35] "Thus Vyasa says 'After the death of her husband, let a virtuous woman observe strictly the duty of continence; and let her daily, after the purification of the bath, present water from the joined palms of her hand to the manes of her husband. Let her day by day perform with devotion the worship of the Gods, and especially the adoration of Vishnu, practising constant abstemiousness. *She should give alms to the chief of the venerable* for increase of holiness, and keep the various fasts which are commanded by sacred ordinances. A woman, who is assiduous in the performance of duties, conveys her husband, though abiding in another world, and herself to a region of bliss.'"

8. ('18) 5 A. I. R. 1918 All. 40 : 41 All. 130 : 48 I.C. 847, Kunj Bihari Lal v. Laltu Singh.

9. ('21) 8 A. I. R. 1921 All. 178 : 43 All. 463 : 62 I.C. 432, Sham Dei v. Birbhadr Prasad.

[36] Jimut Wahan's own commentary on the text of Vyasa as quoted above is to be found in cl. 44 and is as follows :

[37] "Since by these and other passages it is declared, that the wife rescues her husband from hell; and since a woman, doing improper acts through indulgence, causes her husband to fall to a region of horror, *for they share the fruits of virtue and of vice*, therefore the wealth devolving on her is for the benefit of the former owner and the wife's succession is consequently proper."

[38] The subject dealt with in the first section is that of the widow's right to succeed to the entire property of her husband in the absence of all male lineal descendants and according to the above-quoted texts and the commentary thereon the main reason for giving the entire estate to the widow is the consideration that pious acts done by her will confer spiritual benefit on the deceased owner. In the Mitakshara the rule as to the widow's right to succeed to the entire property of her husband under similar circumstances is stated, without any attempt at finding any rational explanation for it from a religious or spiritual point of view. However, in Viramitrodaya which is a book of undoubted authority under both the Benares and Bombay School of Mitakshara Law the matter has been fully dealt with. The two passages in this book to which reference has been made in the Calcutta judgment are couched in much clearer language than that used by Jimuta Vahan and seem to place the power of a Hindu widow to make a gift for pious purposes beyond all dispute, of course on the assumption that such a gift will always be conducive to the spiritual benefit of the husband. We read as follows at p. 136 of Golapchandra Sarkar Sastri's English translation, Edn. 2 :

[39] "As for what appears from the text of Katyayana, viz., 'when the husband is dead, the wife preserving the honour of the family shall take the share of the husband for her life, not, however, the right to make gift, mortgage or sale' namely that the wife succeeding to the property of the husband is entitled to mere maintenance out of the estate, but has no right to make gift, mortgage or sale thereof ; that also refers to the want of right to make gifts to players, dancers, etc., for secular purposes. Because he (Katyayana) himself sets out her right to make gifts for spiritual purposes, also to mortgage or sell so much as is sufficient for such purposes, in the text — 'Preserving in religious observances and fasting, leading a life of austerity, and constantly engaged in the control of passion and in making gifts, the widow, though sonless, ascends to heaven — from the phrase 'ascends to heaven' it appears that she has power to make gifts, etc., even in religious ceremonies that are optional The author of the Smritichandrika and others say that in this text too, the first of the series of duties being enumerated, her power to perform the optional cere-

monies at the expense of her husband's property follows."

[40] Then follows an elaborate discussion of the opinions expressed by different text writers as to the validity of a gift made by a widow for religious and charitable purposes the performance whereof is not enjoined as a spiritual duty by the Shashtra but which are merely optional acts of religious merit. The conclusion is thus summed up at p. 141:

[41] "Therefore, it is established that in making gifts for spiritual purpose as well as in making sale or mortgage for the purpose of performing what is necessary in a spiritual or temporal point of view, the widow's right does certainly extend to the entire estate of her husband; the restriction, however, is intended to prohibit gifts to players, dancers and the like, as well as sale or mortgage without necessity. Accordingly, the term 'being moderate' is inserted; the meaning is, that on obtaining the property she shall not uselessly spend the property. The passage in the Mahabharata on the religious merit of gifts, however, strongly supports our view, for it begins thus: 'It is ordained that the property of the husband when devolving on wives has enjoyment for its use.' Here enjoyment signifies enjoyment allied to religious duty, not however vicious enjoyment."

* * *

"In the latter half of the passage, the very same thing is expressed, namely, 'women shall not waste,' * * *. But gifts and the like for religious purposes are not so, and consequently, cannot be included under the term 'waste'."

[42] It will be observed that in the original texts which are recognised as a binding authority in the Dayabhaga as well as in the Mitakshara School of Hindu law the widow's power to make a gift of a moderate portion of her husband's property is circumscribed only by the limitation that the gift should not be an act of waste and must be made for purposes which are considered by the text writers as religious or charitable. If the gift is made for such purposes, spiritual benefit to the husband follows as a matter of necessary corollary and it is not ordained anywhere that in order to have that effect the gift should be expressly made for that purpose.

[43] In 5 Pat. 646¹⁰ Jwala Prasad J., has discussed the question of the power of a Hindu widow under the Mitakshara law to deal with the property inherited by her from her husband with reference to the original texts in Smritichandrika and the Smritis of Yajnavalkya and Manu and has arrived at practically the same conclusions as found favour with the learned Judges

10. ('26) 13 A. I. R. 1926 Pat. 532 : 5 Pat. 646 : 99 I. C. 782 : 7 P. L. T. 821, Ram Sumran Prasad v. Gobind Das.

responsible for the judgment in 43 Cal. 574.⁷ The following passages from the report at p. 676 may be quoted with advantage :

[44] "The commentary of Yajnavalkya by Vijnaneswara which is followed as an authority by the Benares School discoursing on the text regarding the succession of the widow sums up his conclusions as follows : 'Therefore it has been established that a wedded wife takes the whole estate of a man who being separated from his co-heirs and not subsequently re-united with them dies leaving no male issue.' She thus succeeds as any other male member to the entire estate of her husband and takes possession of it as an absolute owner thereof. Her interest is not in any way limited nor does she hold a life estate only as sometimes it is supposed to be. Only her power of disposition is a qualified one and is analogous to the power of a male coparcener in a joint Mitakshara family, and the reason of this is in the nature of her relationship with her husband. She is supposed to be half the body of her husband and confers so much temporal and spiritual benefit on her husband as half of his own body does and associates with him in the performance of religious sacrifices: Smritichandrika, Chapter XI, para 6. A lawfully wedded wife is called '*patni*' as a correlative of the term '*pati*'. The marriage is attended with nuptial rite and the object of such a marriage is to enable the husband to offer sacrifices and to discharge his religious duties and to beget a son unto him in order that he may be delivered from the hell to which the shades of a sonless man according to Hindu ideas descends A man is enjoined by the shastras to marry a wife as his last religious rite. During the lifetime of the husband the wife acquires ownership of a dependent character and on his demise she obtains independent power over it."

[45] And after quoting a passage from Vraddha Manu the learned Judge goes on :

[45A] "She takes the entire estate of her husband and is enjoined to perform acts calculated to increase the prosperity of her and her lord, such as performing sraddha, digging wells, etc., and giving presents with pious liberality in proportion to the wealth inherited by her. Thus, the performance of religious and charitable purposes and acts conducive to the welfare of her husband are the objects for which she takes the estate of her husband. Accordingly, Smritichandrika in Chapter XI, says that she possesses independent power of making gifts for religious and charitable purposes, for such gifts 'her husband even if wanting a son shall reach the heavenly abodes,' and for purposes not being religious or charitable purely temporal, such as gifts to dancers, etc., she has no independent power."

[46] In 10 Pat. 474,¹¹ the question of the validity, under Mitakshara, of a mortgage effected by a Hindu widow to meet the expenses of digging and consecrating a tank came up before a Bench of the Patna High Court of which also Jwala Prasad J. was a

member. The learned District Judge had set aside the mortgage holding that it had not been proved that the tank had been dug, etc., either under the express instructions of the husband or expressly for the benefit of his soul. In allowing the appeal, Jwala Prasad J. observed :

"[47] The learned District Judge is perhaps under a misapprehension that the widow, in order to justify an alienation, must show that the digging of a tank and the building of a temple, etc., were done either under the express direction of her husband or expressly for the benefit of the soul of her husband. In this, to my mind, the learned Judge has erred, and the reply is given by Mookerjee and Newbould JJ. in 43 Cal. 574⁷ where the recitals in the bond to the effect that the husband of the widow had enjoined her to carry on the digging of a tank and its consecration were not proved. Their Lordships say : 'Assume, then, that the alleged instructions have not been proved, still the fact remains that the widow raised money and applied the same for completion of the buildings and for the excavation and consecration of a tank in connection with the temple. The water of the tank would be needed for purposes of ablution and worship ; but even apart from this, the excavation and consecration of a tank are acts of higher religious merit, as is authoritatively laid down in a series of texts.'

[48] In 10 Pat. 352¹² Ross and Dhavle JJ., however, took a different view and held, preferring to follow the Allahabad judgment against the judgment in 43 Cal. 574,⁷ that a gift by a Hindu widow of a moderate portion of her deceased husband's estate could only be valid if it was expressly made for the spiritual welfare of the deceased. Strangely enough, the judgment of a Bench of their own Court in 5 Pat. 646¹⁰ was not noticed at all. In the judgment reference was also made to the judgment of their Lordships of the Privy Council in 44 ALL. 503.¹³ In that case a Hindu widow had executed a deed of gift conveying certain immovable property of her deceased husband to the temple of Jagannath at Puri and to two Pandas of the temple and their successors directing that half the income of the property should be applied to to the *bhog* of the deity and the other half should go to the Pandas, the gift being described as charitable gift for the salvation of herself, her husband and the other members of the family. It was held that what the widow did was fully in accord with the Hindu religious sentiments and therefore could not be regarded as something in excess of her powers. The question whether

11. ('31) 18 A. I. R. 1931 Pat. 330 : 10 Pat. 474 : 134 I. C. 137, Ram Surat v. Hitnandan Jha.

12. ('31) 18 A. I. R. 1931 Pat. 442 : 10 Pat. 352 : 134 I. C. 129, Thakur Prasad v. Mt. Diba Kuer.

13. ('22) 9 A. I. R. 1922 P. C. 261 : 44 All. 503 : 49 I. A. 383 : 69 I. C. 36 (P. C.), Sardar Singh v. Kunj Bihari Lall.

the gift could be upheld even if the deed of gift did not contain any express recital as to the alienation having been made for the salvation of the husband did not arise for decision. However, in distinguishing the judgment of the Calcutta High Court in 22 Cal. 506¹⁴ their Lordships made the following observations :

[49] "The case in 22 Cal. 506¹⁴ has no analogy to the present. There the alienation was not for the maintenance of an idol which had been established by the husband of the widow, and the dedication was *prima facie* for the widow's own spiritual welfare and not for the husband."

[50] These observations do no doubt lend some colour to the view taken in 10 Pat. 352.¹² It has, however, to be remembered that their Lordships have also referred to the judgment in 43 Cal. 574⁷ and have not expressed any disapproval of, or dissent from, the dicta of Mookerjee J.

[51] In A. I. R. 1937 Pat. 78¹⁵ another Bench of the Patna High Court consisting of Dhavle and Agarwala JJ., took the same view, basing their conclusions on 10 Pat. 352¹² but without noticing the other two judgments of their own Court to which reference has been made above. In this last mentioned case, the alienation had been made to one of the reversioners, apparently with the object of giving him preference over the others. The Calcutta judgment in 43 Cal. 574⁷ was distinguished on the ground that the alienation there was not in favour of one possible reversioner in preference to the others as well as on the ground that the excavation and consecration of the tank in that case was in connection with the temple built by the husband of the donor. It was also observed that the alleged instructions by the husband in that case had not proved to be untrue. This last ground, however, does not appear to be correct, because the entire discussion in the judgment proceeded on the assumption that there were no such instructions given.

[52] In our Province, a Division Bench of this Court consisting of Abdul Raoof and Fforde JJ. in 4 Lah. 336¹⁶ preferred to follow 43 ALL. 463⁹ as against 43 Cal. 574⁷ and held that an act supposed to conduce to the spiritual benefit of the widow is not necessarily an act supposed to conduce to the spiritual benefit of her husband and that in order to uphold a gift by a Hindu widow

of even a moderate portion of her husband's property for religious and charitable purposes the gift must expressly purport to have been made for the spiritual welfare of the deceased.

[53] In A. I. R. 1925 Lah. 2¹⁷ another Division Bench had to decide the question whether a dedication of certain property by two widows to a temple and other buildings erected for religious or *quasi* religious purposes was valid. The dedication was held to be invalid on the ground that the property covered by it could not be regarded as a small portion of the husband's estate. It was not, however, held that the dedication was also invalid because it did not expressly purport to have been made for the spiritual benefit of the husband. The rule applicable to cases like the one before the Court and deducible from the Privy Council judgment in the case in 8 M. I. A. 529⁵ was stated as below at page 13 of the Report :

[54] "The rule thus is established that a Hindu widow may alienate a small portion of her deceased husband's estate for the purpose of an act which is recognised by Hindu religious sentiment and religious belief as conducing to the benefit of the soul of the deceased, but which is not one regarded as obligatory under the Hindu law."

[55] I have already referred to the judgment in 10 Lah. 613.¹ The gift in that case was made to a certain Asthan at Amritsar expressly for the salvation of the donor's husband and the donor herself, although in the conclusion arrived at it was broadly stated that a gift by a widow of a moderate portion of the estate for religious or charitable purposes was valid without the addition of a rider to the effect that the gift should have been made for the spiritual benefit of the husband.

[56] In this state of the authorities, the question whether a gift by a Hindu widow of a moderate portion of her husband's estate for religious or charitable purposes must, in order to be valid, be expressed to be made for the spiritual benefit of her husband or of her husband and herself, or it can be upheld even though not expressly made for the purpose if it has actually been made for a purpose which according to Hindu religious sentiments is regarded as a pious or charitable purpose capable of conducing to the spiritual welfare of the husband, seems to be one of considerable difficulty on which there is a sharp cleavage of judicial opinion. In view of the conflict of opinion not only amongst

14. ('95) 22 Cal. 506, Ram Kawal Singh v. Ram Kishore Das.

15. ('37) 24 A. I. R. 1937 Pat. 78 : 168 I. C. 129, Suraj Kumar Singh v. Radha Krishnaji.

16. ('24) 11 A. I. R. 1924 Lah. 137 : 4 Lah. 336 : 78 I. C. 266, Munshi Ial v. Shiv Devi.

17. ('25) 12 A. I. R. 1925 Lah. 2 : 79 I. C. 670, Mt. Tehl Kaur v. Amar Nath.

different High Courts but amongst different Judges of the same Courts, and of the importance of the subject generally I should, subject to the approval of my Lord the Chief Justice, like to have it decided by a Full Bench.

[57] Mr. Mittal also contended that the land gifted to the Gaushala being about one-fourth of the entire estate of the husband could not be regarded as either a small or a moderate portion of such estate which could be validly gifted by the widow for a religious or charitable purpose. In 37 Cal. 1¹⁸ it was held that between one-fourth and one-third of an estate was a reasonable amount to expend on the performance of an optional religious ceremony by the widow. In 44 ALL. 503¹³ their Lordships of the Judicial Committee upheld a gift of a one-fifth share of the estate as a gift of a moderate portion thereof. In 4 Lah. 336¹⁶ while conceding that the answer to the question whether the property gifted in a particular case did or did not represent a moderate portion of the estate must largely depend upon the circumstances of each case, it was observed that it was very doubtful if any Court could reasonably hold that a gift amounting to one-fourth of an inheritance could be fairly regarded as a gift of a small portion of the property. In my view, the question of the proportion which the property that can be validly disposed of by a Hindu widow for religious or charitable purposes not partaking of the nature of purposes enjoined by the texts as absolute spiritual necessities for which transfer of even the whole estate is permissible can reasonably bear to the entire estate of the husband is one regarding which no hard and fast rule should be laid down and which should be decided in each case as a question of fact with due regard to all the relevant circumstances. In view, however, of the expression of opinion in 4 Lah. 336¹⁶ against the validity of the gift of a one-fourth of the estate, even though it is no more than a mere *obiter dictum* I would prefer to refer this question also to a Full Bench.

[58] For the above reasons, I direct that the papers of this case may be laid before my Lord the Chief Justice for considering the desirability of referring the following questions to a Full Bench for decision.

[59] (1) Has a gift by a Hindu widow of a moderate or small portion of her husband's estate in her possession for religious and charitable purposes not enjoined as absolute

spiritual necessities to be expressly made for the spiritual benefit of the husband in order to be valid?

[60] (2) Are the powers of a widow to make a gift of a small or moderate portion of her husband's estate for charitable or religious purposes the same under custom as under the Hindu law?

[61] (3) Should the answer to the above question be in the negative, what are the powers of a widow governed by custom in the matter of such gifts?

[62] (4) Can one-fourth of the husband's estate ever be regarded as a small or moderate portion of such estate which can be validly gifted by the widow for a religious or charitable purpose of an optional nature?

Opinion of the Full Bench

[63] **Achhru Ram J.** — The following four questions have been referred to this Bench for decision :

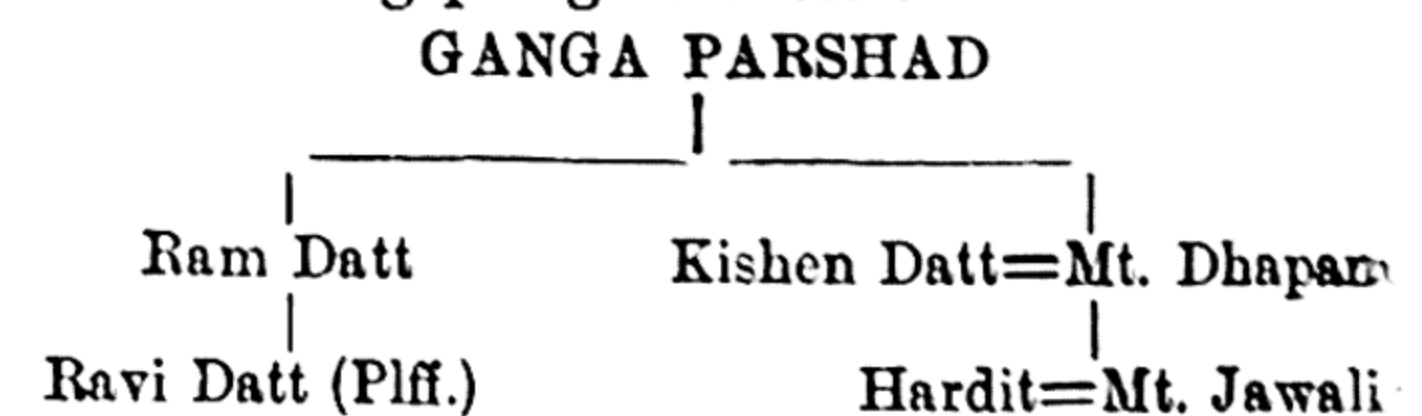
[64] (1) Has a gift by a Hindu widow, of a moderate or small portion of her husband's estate in her possession for religious and charitable purposes, not enjoined as absolute spiritual necessities to be expressly made for the spiritual benefit of the husband in order to be valid?

[65] (2) Are the powers of a widow to make a gift of a small or moderate portion of her husband's estate for charitable or religious purposes the same under custom as under the Hindu law?

[66] (3) Should the answer to the above question be in the negative, what are the powers of a widow governed by custom in the matter of such gifts?

[67] (4) Can one-fourth of the husband's estate ever be regarded as a small or moderate portion of such estate which can be validly gifted by the widow for a religious or charitable purpose of an optional nature?

[68] The facts that have given rise to this reference may be briefly stated as follows : The parties to the suit are Gaur Brahmans of the village Garhi Brahmanan in Sonapat Tehsil. Their relationship will appear from the following pedigree table :



Hardit died in the year 1906. The landed property left by him was mutated in the names of his mother, Mt. Dhapan and his widow Mt. Jawali in equal half shares. The land in dispute comprising 9 *bighas* and 16 *biswas* was originally a part of the *shamilat* of the village which was partitioned in the year 1910. The suit land was allotted to Mt. Dhapan and Mt. Jawali. It was lying waste at the time of the partition but was subsequently broken up at the instance of the

18. ('10) 37 Cal. 1 : 1 I. C. 945, Churaman Sahu v. Gopi Sahu.

two ladies. Sometime later, Mt. Dhapan gifted her share of the land to her daughter-in-law Mt. Jawali. On 20th July 1942 Mt. Jawali made a gift of the land in suit in favour of the Gaushala at Sonapat. On 21st October 1942 Ravidatt brought a suit for a declaration to the effect that the gift by Mt. Jawali should not affect his reversionary right after her death or re-marriage. The suit was dismissed by the two Courts below on the finding that it had been made for a charitable or religious purpose and that Mt. Jawali was fully competent to make a gift of the suit land which formed about one-fifth of the entire estate, for such purposes. On a second appeal by the plaintiff the above-mentioned four questions have been referred to a Full Bench.

[69] Religious acts, according to Hindu law text-books, are divisible into two classes, viz., *nitya karmas* and *kamya karmas*. The former category comprises acts or observances which are considered to be in the nature of spiritual necessities and which must needs be performed in order to secure salvation of the soul. To the latter category belong those acts the performance whereof is not enjoined as indispensable religious obligations but which are regarded as pious acts in themselves and which when performed are supposed to confer some religious merit and to carry with themselves some spiritual benefit. These acts have sometimes been called spiritual luxuries. According to Hindu religious notions, religious merit or spiritual benefit, in a larger or a smaller degree, according as the act falls within the first or the second category, may be acquired not only by means of acts done by oneself during one's own lifetime but also by means of acts or observances done or performed after one's death by someone else considered to be competent to do or perform such acts or observances for the benefit of one's soul. That a widow is competent to confer spiritual benefit on her husband by means of such acts or observances has never been doubted. It is not disputed that, with reference to acts or observances which are considered as essential for the salvation of the soul of her deceased husband, she has very wide powers of alienation over the husband's estate in her hands, extending even to the sale of the whole of it, in case the income of such estate is not sufficient to cover the expenses. It is also not disputed that she can, if need be, alienate a reasonable and moderate portion of the estate to meet the expenses of reli-

gious acts falling within the second category, provided those acts confer spiritual benefit on the husband. The question that has arisen is, whether to uphold a transfer of a reasonable portion of the estate in or for the performance of a pious act not constituting an indispensable religious obligation, it is enough to prove that the act itself was such as, according to the well-recognised Hindu religious ideas and sentiments, could be supposed to conduce to the spiritual welfare of the husband, or it is also necessary to prove that the widow actually purported to do the act with the avowed object of benefiting the husband's soul. On account of the very nature of the acts or observances, this question does not arise in the case of acts or observances falling within the first category. They are acts or observances expressly enjoined for securing salvation of the husband's soul, e. g., the performance of his obsequies, the periodical observance of his obsequial rites and the payment of his debts.

[70] According to the text-books, a widow is a part of the husband's own self and any pious act done by herself out of the estate in her hands is to be regarded as the husband's own act of which the benefit must be shared equally by the soul of the husband and herself. In these text-books the matter is, naturally enough, discussed while dealing with the question of widow's right to succeed to the estate of her husband who has died without any male issue. The following texts from Smritis are referred to and relied on by the commentators and form the foundation of the rules formulated by them:

[71] Brihaspati in verses 46 to 51 in Chap. 55 observes as follows:

[72] "46. In the revealed texts, in the traditional law (of the Smriti), and in popular usage, the wife is declared to be half the body (of her husband), equally sharing the outcome of good and evil acts.

[73] 47. Of him whose wife is not dead, half his body survives. How should any one else take the property, while half (his) body lives?

[74] 48. Although kinsmen, although his father and mother, although uterine brothers be living, the wife of him who dies without leaving male issue shall succeed to his share.

[75] 49. A wife deceased before (her husband) takes away his consecrated fire; but if the husband dies before the wife, she takes his property, if she has been faithful to him. This is an eternal law.

[76] 50. After having received all the moveable and immovable property, the gold, base metals and grain, liquids and wearing apparel, she shall cause his monthly, six-monthly, and annual Sradhas to be performed.

[77] 51. Let her propitiate with funeral oblations and pious liberality her husband's paternal uncles, Gurus, daughter's sons, sister's sons, and maternal

uncles; also aged or helpless persons, guests, and women (belonging to the family)" *vide* pages 377 and 378 of Vol. 33 of Sacred Books of the East, edited by Professor F. Maxmuller, containing the translation of Narada and Brihaspati by Julius Jolly.

[78] Vyasa says as follows:

[79] "After the death of her husband, let a virtuous woman observe strictly the duty of continence, and let her daily, after the purification of the bath, present water from the joined palms of her hands, to the manes of her husband. Let her day by day perform with devotion the worship of the Gods, and especially the adoration of Vishnu, practising constant abstemiousness. She should give alms to the chief of the venerable for increase of holiness, and keep the various fasts which are commanded by sacred ordinances. A woman who is assiduous in the performance of duties conveys her husband, though abiding in another world, and herself to a region of bliss."

[80] In Katyayana we have the following three texts:

[81] "When the husband is dead (the wife) preserving the honour of the family shall take the share of the husband for her life not, however, the right to make gift, mortgage or sale."

[82] The second text of Katyayana reads as follows:

[83] "Preserving in religious observances and fasting, leading a life of austerity, and constantly engaged in the control of passion and in making gifts, (the widow) though sonless, ascends to heaven."

[84] The third text of Katyayana reads as follows:

[85] "Let the sonless (widow), preserving unsullied the bed of her husband, and abiding with her venerable protector, only enjoy (her husband's property) being moderate until her death, after her, let the heirs take."

[86] The last is the following text from Prajapati:

[87] "Having taken his moveable and immovable property, the precious and base metal, the grains, the liquids, and the clothes, let her duly offer his monthly, half-yearly, and yearly funeral repasts. With presents offered to his manes, and by pious liberality, let her honour the paternal uncles of her husband, his Gurus and daughter's sons, the children of his sisters, his maternal uncles and also aged and unprotected persons and guests."

[88] It will be observed that this passage in Prajapati's Smriti is almost identical with the concluding sentence in Brihaspati's Smriti.

[89] It may be noted that in some editions of Brihaspati's Smriti the concluding words of verse 46 have been differently worded and can be translated as "equally sharing the fruits of the pure acts of the husband" instead of "equally sharing the fruits of pure and impure acts" which is the translation as quoted above. However the text generally accepted and referred to in the commentaries is that translated by Julius Jolly.

[90] The expression "pious liberality" appearing in the texts of Brihaspati and Prajapati has been explained in para. 20 of S. 1 of Chap. 11 of Smriti Chandrika as follows: "By pious liberality by presents, etc., made for the construction of wells, tanks, and the like." In the first part of Chap. 3 of Vira-Mitrodaya the same expression in the aforesaid texts has been stated to denote "reservoir of water and the like (works for public good) or the fees and the like (given to Brahmans) for the performance of a ceremony."

[91] Explaining the text of Katyayana which appears to deny to the widow the right to sell, gift or mortgage her husband's estate in her hands the authors of Vira-Mitrodaya and Vyavahara Mayukha have pointed out that the prohibition against transfers is intended to operate only on acts of waste and does not affect her power to transfer the whole or a reasonable part of the estate in or for the performance of religious acts or observances that constitute spiritual necessities or for doing pious acts which are believed, according to the Hindu religious ideas, to conduce to the spiritual welfare of the husband. In S. 3 of Chap. 3, part I of Vira-Mitrodaya (*vide* page 136 of Golapchandra Sarkar Sastri's English Translation) the following observations are to be found:

[92] "As for what appears from the text of Katyayana, viz.: 'When the husband is dead, (the wife) preserving the honour of the family shall take the share of the husband for her life, not however, the right to make gift, mortgage or sale'—namely, that the wife succeeding to the property of the husband is entitled to mere maintenance out of the estate, but has no right to make gift, mortgage or sale thereof;—that also refers to the want of right to make gifts to players, dancers, etc., for secular purposes. Because he (Katyayana) himself sets out her right to make gifts for spiritual purposes, also to mortgage or sell so much as is sufficient for such purposes, in the text,—'Preserving in religious observances and fasting, leading a life of austerity, and constantly engaged in the control of passion and in making gifts, (the widow) though sonless, ascends to heaven,' from the phrase 'ascends to heaven' it appears that she has power to make gifts, etc., even in religious ceremonies that are optional, and *a fortiori* in those daily and occasional ceremonies which are enjoined by the Sastras, and the omission whereof entails demerit. And because to the same effect is the text of Prajapati cited before, namely—'Having taken the moveables and immovables, etc. The author of the Smriti Chandrika, and others, say that in this text too, the first (of the series of duties) being enumerated, her power to perform the optional ceremonies (at the expense of her husband's property) follows.'"

[93] In Vyavahara Mayukha the matter is dealt with in para. 4 of S. 8 of Chap. 4 where the learned author observes:

[94] "As for this text of Katyayana, it is a prohibition of gift of money, or the like, to the Bandi, Charana, and the like. But gift for religious objects, and mortgage of the like, suitable to those objects may even be made, since fixed and moveable property are both noticed in the above quoted texts: *vide* p. 34 of the Hindu Law Books edited by Whitley Stokes.

[95] In *Smriti Chandrika*, Devanna Bhut says as follows with reference to a similar text of *Prajapati*:

[96] "The competency of a widow to make gifts for religious and charitable purposes, such as the maintenance of old and helpless persons, being sanctioned by law, the above passage must be held as contemplating the want of independence of a widow in making gifts, etc., for purposes not being religious or charitable, but purely temporal, such as gifts to dancers, and the like."

[97] A widow thus possesses independent power to make gifts for religious objects. . . .

[98] The daily making of religious gifts as directed in the above passage would be impracticable, if the widow were held to possess no independent power. It is hence to be understood that the law does not deny the independent power of a widow even to make a mortgage or sale, for the purpose of providing herself with funds necessary for the discharge of religious duties:" *vide* pp. 169 and 170 of T. K. Iyer's translation.

[99] There is some, at least apparent, conflict in the *Smritis* as to a widow's right to succeed to the property of her husband on his dying without male issue. While some of them have in quite clear and unambiguous terms recognised her right to succeed to all kinds of property left by the husband, others have limited her right to succeed only to moveable property, and some have, in dealing with the question of inheritance, used language which may give one the impression that they meant to exclude her absolutely. The *Smriti* of *Yajnavalkya* belongs to the first category. In verses 136 and 137 of Chap. 2 he has unequivocally declared the wife to be an heir, in the absence of male issue, whose right to succeed takes precedence over the rights of daughters, parents, brothers, etc., and is not subject to any limitations or qualifications either with reference to the nature of the property or otherwise. The task of *Vijnanesvara* in the *Mitakshara*, which professed to be nothing more than a mere gloss on the text of *Yajnavalkya*, was comparatively a very simple one. Of course as a logical consequence of his own conception of joint family and its necessary implications he has noted that the rule deduced from the texts mentioned above dealing with a widow's right of inheritance "regards the widow of a separated brother." However, beyond placing this limitation on her right to succeed he did not feel the necessity of discussing the

texts in other *Smritis* which appeared either to deny to her this right altogether or to place it under further limitations with reference to the nature of the property. Nor did it become necessary for him to attempt to find some rational basis for the rule stated by *Yajnavalkya*. However, the position of *Jimuta Vahana*, *Mitra Misra* and *Devanna Bhut*, the authors respectively of *Dayabhaga*, *Vira-Mitrodaya* and *Smriti Chandrika*, who also support a widow's right to succeed to all kinds of property left by her husband, was quite different. Their works did not profess to be merely commentaries on any particular *Smriti* or *Smritis*, they had undertaken the far more onerous task of evolving a principle after a consideration of all the relevant texts and of attempting to reconcile the apparent conflict in some of them. They did, therefore, feel the necessity of trying to find a rational basis for their views and to discover from the texts some support for the same. The three of them have based their conclusions on almost identical grounds. They refer to the texts declaring the person of a wife to be a part and parcel of the husband—to be in fact a half of his body—and, therefore, competent to confer spiritual benefit on him after his death by doing pious acts. They also refer to the texts, according to which a husband and wife share the fruits of good and evil acts done by each other. They deduce from these texts the recognition of the right of a widow, as a part of his ownself, to hold for her life the entire estate of her husband who has died without leaving any male issue, so as to be able to advance his spiritual interests by fulfilling the prescribed religious obligations which, by their very nature, are calculated to secure the salvation of his soul, and by doing other pious acts of a religious or charitable nature, which also, according to Hindu scriptures and text-books, conduce to spiritual welfare, and of which the benefit would be equally shared by her own and her deceased husband's souls. A widow being strictly enjoined to use the estate for spending whatever is left, after fulfilment of the prescribed religious obligations and providing for her own maintenance and the maintenance of those whom her husband was bound to support, on the performance of such pious acts and to refrain from all waste, the spiritual welfare of the husband is regarded as completely assured by conceding to her the right to succeed to the whole of his estate.

[100] In para. 44 of S. 1 in Chap. 11 of *Daya Bhaga*, *Jimuta Vahana*, after an elaborate

discussion of the relevant texts in the preceding paragraph, says :

[101] "Since by these and other passages it is declared, that the wife rescues her husband from hell; and since a woman doing improper acts through indigence, causes her husband to fall to a region of horror; for they share the fruits of virtue and of vice; therefore the wealth devolving on her is for the benefit of the former owner: and the wife's succession is consequently proper:" *vide* page 315 of Hindu Law Books edited by Whitley Stokes.

[102] It will be observed that Jimuta Vahana does not base the recognition of the widow's right to succeed to her husband's property merely on her competency to offer funeral oblations to her soul, though otherwise rules of succession formulated by him proceed on that basis alone. Such recognition is, on the other hand, largely based on the conviction that the widow would retain the property essentially for the benefit of the former owner because she would be sharing with him the fruits of the pious acts performed by her with the help of that property.

[103] In Smriti Chandrika paras. 6 and 21 of S. 1 of Chap. 11 are worth quoting: Paragraph 6 runs as under :

[104] "That a wife is half the body of her husband is pointed out in the following passage of the Scripture. 'She who is a wife (Patni) is half of her husband's body (Atmanah) itself'. The word 'Atmanah' means 'of the body'. The substance of this passage is that a wife confers so much benefit temporal and spiritual on her husband as half of his own body does."

[105] Paragraph 21 reads as follows :

[106] "The rule hence inculcated is that a Patni having taken the entire property of her husband inclusive of immovables, must, in proportion to the wealth derived by her and in presence of the spiritual councillors and priests of her deceased husband, perform acts (within the competence of a female to perform) calculated to increase the prosperity of herself and of her lord; such as making *Sraddhas*, digging wells, etc., and giving presents, all requiring for their accomplishment pecuniary aid."

[107] From Viramitrodaya one passage has already been quoted. In some later passages in the same section the question of the widow's right to give away the whole or a part of the husband's estate is directly dealt with, though, of course, under the general discussion of her right of inheritance. I am quoting here the more important passages occurring at pages 138 to 141 of Golapchandra Sastri's translation :

[108] "Is it, that even when a gift or the like disposition of her husband's property is made by the widow,—this is *per se* invalid? This, however, is not reasonable, since her succession to the entire estate of her husband being declared in the texts of Manu and other sages, her proprietary right arises thereto; hence it would be contradic-

tory to say that gifts, etc., (made by her) are *per se* invalid.

[109] Hence in the manner mentioned by him, let in this instance too, moral offence, by reason of the violation of the prohibition, be incurred by a widow who out of evil disposition makes gifts, etc., of her husband's estate, solely for the purpose of putting the kinsmen (of her husband) to distress. And certainly a moral offence too is not committed by one who makes gifts for religious purposes, or who sells or mortgages for the purpose of her own maintenance. . . . Otherwise, if her right (to make gifts, etc.) be not admitted, then there would be an irreconcilable conflict (of the text of Katyayana) with the texts enjoining gifts. . . .

[110] Therefore, it is established that in making gifts for spiritual purposes as well as in making sale or mortgage for the purpose of performing what is necessary in a spiritual or temporal point of view, the widow's right does certainly extend to the entire estate of her husband; the restriction however, is intended to prohibit gifts to players, dancers and the like as well as sale or mortgage without necessity. Accordingly the term 'being moderate' is inserted; the meaning is, that on obtaining the property she shall not uselessly spend the property. The passage in the Mahabharata on the religious merit of gifts, however, strongly supports our view, for it begins thus: 'It is ordained that the property of the husband when devolving on wives has enjoyment for its use.' Here enjoyment signifies enjoyment allied to religious duty, not however vicious enjoyment; 'ordained,' i. e., declared by Manu and others. In the latter half (of the passage) the very same thing is expressed, namely, 'women shall not waste', i. e., uselessly expend the property of their husband; by the phrase 'on any account' it is intimated that waste is under all circumstances reprehensible; *apahara* (waste) is theft,—making useless gifts to dancers, players, and the like, and the wearing of delicate apparel, etc., the tasting of rich food, etc, and the like, also being improper for a widow who is enjoined to restrain her passions, are equal to theft: thus the term *apahara* is used in a secondary sense. But gifts and the like for religious purposes are not so, and consequently cannot be included under the term *apahara* or waste."

[111] The above passages in the original works on Hindu law, whose authority is beyond question, seem clearly to recognise in a Hindu widow the power to make a gift of or otherwise alienate, a moderate portion of her husband's estate in or for the performance of such pious acts as are believed to be conducive to spiritual welfare and further to recognise that spiritual benefit resulting from these acts will invariably be shared by the husband with her. In order to have this result it does not appear to be necessary at all that the widow should purport to do the acts with the avowed object of conferring spiritual benefit on the husband. Indeed the letter as well as the spirit of these passages seems to be wholly inconsistent with the opposite view. According to them, the question whether a particular act will or will not be conducive to the spiri-

tual welfare of the husband has to be decided with reference to the nature of the act, and not with reference to the expressed object of the doer of the act. The limit within which this power can be exercised by a widow is also indicated though it cannot be said to have been precisely defined in these passages. The transfer should not amount to a waste of the estate with reference to the object of the transfer as well as with reference to the extent of the estate transferred. It should not amount to "*apahara*" or theft of the rights of persons entitled to succeed to the estate after her death. In the words of Mitra Misra it should not be intended to put the kinsmen of the husband to distress.

[112] The law as stated in Paras. 104 and 105 and in the notes under Para. 105 of Shyama Charan Sarkar's *Vyavastha-Chandrika* also seems to be the same. Paragraph 104 runs as follows:

[113] "A widow is competent to give, mortgage or sell her husband's property for such secular purposes as are legally necessary,—(viz.,) for her own subsistence, for payment of revenue and for any act beneficial to the estate; as well as for religious purposes, — (viz.,) for payment of her husband's debts, marriage of his daughter, maintenance of those whom he was bound to support, and for securing spiritual welfare by performing religious rites, making pious and charitable gifts, and the like."

[114] Paragraph 105 runs as follows:

[115] "Without the consent of her husband's reversioners a widow is, however, competent to sell so much, and no more, of his property as may be required for the performance of the indispensable duties (*nitya karma*). If such acts cannot be performed without selling the whole property, the whole may be sold by her for that purpose, because such duties *must* be performed. But for the performance of an optional religious act (*kamya karma*) she may, without their consent, dispose of only a small portion of the estate."

[116] In the note under this paragraph it is stated:

[117] "An indispensable act or duty (*nitya karma*) is that which *must* be performed, and cannot be neglected without sinning, as the first *sraddha* of the father or of the husband, the marriage of his daughter, or the like. And an optional religious act is such as the performance of it rests upon option, and there is no sin on the non-performance, but religious merit on the performance thereof."

[118] It will be observed that in defining the indispensable and the optional religious acts account is only taken of the nature of the acts and not of the expressed objects of the doer thereof. The same may be said of the following passages occurring in *Vyavasthas* Nos. 35 and 36 at pages 54 and 55 of another book by the same author styled "*Vyavastha-*

Darpana." *Vyavastha* No. 35 reads as follows:

[119] "A widow is, however, competent, even without the consent of the reversioners, to make a sale or other disposition of her husband's property for the liquidation of his debts, for the marriage of his daughter, for the support of such persons as it was incumbent upon him to support, likewise to defray the expenses of such other acts as are beneficial for his soul or very necessary to be performed."

[120] *Vyavastha* No. 36 reads as follows:

[121] "Should it happen that the widow is unable to maintain those who must be supported, to discharge the debts of her husband, and perform those acts which are indispensable, unless she sell or otherwise dispose of the greater part or the whole of her inherited property, she is allowed by law and competent to do so; but in order to enable her to perform such religious acts as, though beneficial to her husband, are optional, she may dispose of only a small or moderate portion. Such dispositions for such acts are valid in law even though the same may be made without the consent of her husband's kindred or reversioners."

[122] I now propose to deal with the relevant judicial precedents. The following cases were referred to by counsel for the parties during the course of arguments: 8 M. I. A. 529,⁵ 4 ALL. 482,⁶ 22 Cal. 506,¹⁴ 37 Cal. 1,¹⁸ 43 Cal. 574,⁷ 41 ALL. 130,⁸ 43 ALL. 463,⁹ 4 Lah. 336,¹⁶ 5 Pat. 646,¹⁰ 10 Pat. 352,¹² 10 Pat. 474¹¹ and A. I. R. 1937 Pat. 78.¹⁵

[123] In 8 M.I.A. 529⁵ on the death without any male issue of a Brahmin zemindar admittedly governed by Hindu law, his widow succeeded to the *zemindari* estate. On the widow's death no reversioner of her husband entitled to succeed to the estate was in existence. The estate was taken possession of by the respondent claiming an absolute title thereto under a certain arrangement entered into between himself and the widow for the discharge of certain debts incurred by her. The Crown through the Collector of Masulipatam brought a suit for possession of the estate on the allegations that on the widow's death the property escheated to it and that it was not bound by any encumbrance created, or by any other arrangement entered into, by the widow. The suit was thrown out by the Sudder Dewanny Adawlut on the ground that, under the Hindu law, the property of a Brahman dying without any heirs could not escheat to the Crown. On appeal, this judgment was reversed by the Privy Council and the case was remanded for a fresh decision and for determination, *inter alia*, of the question relating to the validity of the arrangement under which the defendant claimed title to the property in suit, and the right of the

Crown to contest the validity of that arrangement. The suit was again dismissed by the Sudder Dewanny Adawlut on the findings that the Crown had no *locus standi* to challenge the validity of any alienation of, or any encumbrance created on, property held by a Hindu widow on a life tenure, which escheats to it on such widow's death without any reversioner, and that, in any case, it was estopped from denying the validity of the particular transaction then in question, but without giving any decision regarding the validity or otherwise of the transaction on the merits. The Privy Council again reversed the decree of the Sudder Dewanny Adawlut and, after setting aside the findings on which that decree was based, once more remitted the case to the trial Court for a decision of the question which it had left undecided. In doing so their Lordships thought it fit to define a Hindu wife's power of alienation over the property inherited by her from her husband in the following words:

[124] "It is admitted, on all hands, that if there be collateral heirs of the husband, the widow cannot of her own will alien the property except for special purposes. For religious or charitable purposes, or those which are supposed to conduce to the spiritual welfare of her husband, she has a larger power of disposition than that which she possesses for purely worldly purposes. To support an alienation for the last she must show necessity."

[125] The answer to the first question referred to us appears to me to depend upon the correct interpretation of the words "which are supposed to conduce to the spiritual welfare of her husband" as used by their Lordships in the above passage. The question is by whom the particular purpose should be supposed to conduce to the husband's spiritual welfare? If these words are interpreted to mean "purpose supposed by the widow herself to conduce to the spiritual welfare of her deceased husband," they may certainly be taken to support the respondent's contention. Such an interpretation, however, does not seem to be, by any means, a reasonable interpretation and, if accepted, will place the reversions "absolutely at the mercy of the widow's own idiosyncrasies. In my judgment what their Lordships really meant was "purpose supposed by the Hindu religion to be conducive to the spiritual welfare of the husband." If this interpretation is accepted, it follows that the question of the validity or otherwise of a transfer made by a widow must be decided with reference to the nature of the act itself, and the spiritual efficacy attached to

that act by the generally prevailing Hindu religious notions and ideas. If the generally prevailing Hindu sentiment regards an act as calculated to conduce to the spiritual welfare of the husband, the act must be held to be one for which the widow possesses larger powers of alienation, whether or not she did the act with the avowed or express object of conferring spiritual benefit on her husband.

[126] In 4 ALL. 482⁶ the daughter of the last male holder sued to avoid a gift made by her mother to the family priest of a house about sixteen months after the death of her husband. The gift, in the instrument of gift, was described as "*Bishenprit*" or made in honour of the God Vishnu. The Courts below upheld the gift on the ground that it had been made for a pious and religious purpose. On second appeal, a Division Bench consisting of Sir Robert Stuart C. J. and Tyrrell J. reversed the decision of the Courts below and decreed the suit. In holding the gift to be invalid Tyrrell J., who wrote the judgment of the Bench made the following observations:

[127] "It is beyond controversy that a "*Bishenprit*" donation made by the full and absolute owner of a property would be in itself a pious and lawful act. But it is equally certain that the disposing powers of a Hindu widow succeeding for her life to the estate of her deceased husband fall far short of full and absolute dominion. Such a person has power to alienate so much of such property and no more as may be necessary for one or more of the following definite purposes only, viz., to pay debts contracted by the husband; to support such members of his family as he, if living, would have been bound to support; to maintain herself in decency and sobriety; to perform his exequial and subsequent ceremonial rites; and lastly to make suitable gifts for the benefit of his soul.

[128] This rule is referred to in the Privy Council case cited by the Court of first instance, in 8 M.I.A. 529⁵ Here we find the principle laid down which is to be applied in test of alienations of the character before us, and it has direct and especial reference to the spiritual welfare of the deceased owner of the estate.

[129] The point is now covered by authority that acts of alienation calculated to be of religious benefit and efficacy to the widow, or to any persons other than the deceased owner, will not justify an alienation of any part of the property in the hands of the widow. It has been justly pleaded in the second and third grounds of appeal that there is nothing on the record sufficient to show, nor other good reason for believing, that the gift of the house in suit, made some sixteen months after the death of Ram Kishen without any reference to him or his funeral celebrations, and specifically declared to be "*Bishenprit*", or to the honour of Vishnu, was a gift made to benefit Ram Kishen in his after-state; and was not, on the contrary, as indeed from the terms of deed of gift in this case it plainly appears to be, an offering by the widow to a

favoured idol for her own special credit and spiritual advantage."

[130] It is difficult to understand why a gift made to the honour of Vishnu by his widow of a part of his estate in her hands could not be supposed to be conducive to the spiritual benefit of the husband within the meaning of the observations made by their Lordships of the Judicial Committee in 8 M.I.A. 529.⁵ There is nothing in those observations to justify the assumption that unless an act, which is in itself a pious act and which, if done by the husband during his lifetime, would have carried with itself some religious merit, is done with reference to the husband himself or his funeral celebrations, it cannot confer any spiritual benefit on him. In taking the view that they did the learned Judges did not, I must say with respect, correctly appreciate the rule enunciated in the judgment of the Judicial Committee and did not further take any note of the rules embodied in the text-books of Hindu law, to which reference has already been made, and according to which ordinarily the benefit of any pious act done by the widow out of the wealth of the husband in her hands is shared by both the widow herself and the soul of her deceased husband. There is nothing to show that Vishnu was the favoured idol only of the widow and was not also the favoured deity of her husband. Unless it could be shown that the husband himself had no faith in the God Vishnu and could not possibly have made a gift in his honour, it could not, consistently with the above-mentioned rules, be held that the offering made by the widow to the God could only enure for her special credit and spiritual advantage and could not confer any spiritual benefit on the husband's soul.

[131] In 22 Cal. 506,¹⁴ the widow gifted considerable landed property comprising a whole *mauza* to a Pujari of a *thakurbari* (temple) established by the mother of her deceased husband. On a suit by the husband's reversioners after the widow's death the gift was set aside. The *ratio decidendi* of the High Court decision is contained in the following observations appearing at page 510 of the Report:

[132] "Here the idol to which the land was given was not established by Dhanesh Kunwar's husband, but by his mother. The husband had not in his lifetime thought it necessary to make any provision for the maintenance of the idol, and the dedication was *prima facie* one more for the widow's own spiritual welfare than for that of her husband. The property alienated was, moreover, of considerable value, and, according to the only evidence there is on the subject represented nearly

one-third of the estate inherited. The alienation cannot, therefore, be supported, either on the ground that it was for a religious necessity, that is to say, for the spiritual welfare of her husband, or that, being for a pious purpose, the property alienated was small in value and represented only a very small portion of the estate inherited."

[133] From the language employed in the above passage it appears that, although the learned Judges did not regard the gift as one made for religious necessity, they were not disinclined to regard it as one made for a pious purpose for which the widow could have justifiably transferred a small portion of the estate. The particular gift having been held to be invalid by reason of its covering considerable portion of the estate, i. e., about one third thereof, this judgment is certainly no authority for the view that a gift by a Hindu widow for a religious or charitable purpose must, in order to be upheld as one conducive to the spiritual welfare of her husband, be expressly made with that object.

[134] In 37 Cal. 1¹⁸ decided by a Bench consisting of Mookerjee and Carnduff JJ. the gift of a little more than one-fourth but a little less than one-third of her husband's estate by a Hindu widow governed by the Mitakshara law to her daughter, on the occasion of the latter's *gowna* ceremony, was upheld. The daughter died without any issue during her mother's lifetime and a suit to avoid the gift was brought by her father's reversioner after the death of the donor. The *gowna* ceremony was held to be one in continuation of the marriage of the daughter the performance whereof was regarded by Hindu Sastras as a religious or pious act conferring spiritual benefit on the husband if performed by his widow after his death. It is not stated in the judgment that the widow at the time of the gift expressed any desire to confer any spiritual benefit on her deceased husband. In all probability she was not even aware that the act carried with itself any religious or spiritual merit, her only object in making the gift being to confer some material benefit on her daughter. The gift was, however, upheld because of the religious merit attached to it by the commonly prevailing Hindu religious notions. In dealing with the question whether the property gifted constituted such a reasonable portion of the estate as could be validly disposed of by the widow for a pious purpose it was pointed out that the question had to be decided with reference to the circumstances of the particular disposition. In view of the fact that, besides the widow, the

only other member of the family of the deceased owner was one daughter, as well as in view of the rule of Mitakshara school of Hindu law, embodied in S. 21, Part 1 in Chap. 2 of Viramitrodaya, providing for allotment to a maiden daughter, in case of partition of a joint family estate, of a share equal to one-fourth that she would have been entitled to if instead of being a daughter she had been a son, as representing her dowry and marriage expenses, the gifted property, which was valued at Rs. 1200 was held to be not more than a reasonable and moderate portion of the entire estate which was valued at Rs. 3800.

[135] In 43 Cal. 574⁷ (*Mukerjee and Newbould JJ.*) *Mt. Puna Koer*, widow of one *Shyam Lall Misser*, granted permanent leases on nominal rents, of a little more than 2 bighas out of approximately 10 bighas of land left by her husband in order to raise, by way of premium received under the aforesaid leases, a sum of Rs. 528 for the excavation and consecration of a tank and for the erection of a wall in connexion with a temple founded by her husband shortly before his death. In a suit brought by the reversionary heir, after the widow's death for a portion of the land demised, by setting aside the leases granted by the widow, it was not disputed that the amount raised was duly applied for the aforesaid purposes. The Courts below decreed the suit holding that the excavation and consecration of the tank and the erection of the wall were not legal necessities. The recitals contained in the lease deeds that the donor's husband had enjoined her to carry out the works mentioned were found to be untrue. On second appeal, the High Court reversed the decree and upheld the leases. The judgment of the Bench which was written by Sir *Asutosh Mookerjee* contains a very lucid exposition of the law and has been referred to in almost all subsequent cases dealing with the subject. The following observations appearing at pp. 579 to 584 may be quoted with advantage :

[136] "The test in cases of this description where a deed by a limited owner with qualified power of alienation is impeached is, whether the purpose for which the alienation was made was proper or legitimate. The limits of this power were defined by *Turner L. J.* in a celebrated passage in the judgment of the Judicial Committee in 8 M. I. A. 529⁵ : 'the widow cannot of her own will alien the property, except for special purposes. For religious and charitable purposes or those which are supposed to conduce to the spiritual welfare of her husband, she has a larger power of disposition than that which she possesses for purely worldly

purposes. To support an alienation for the last, she must show necessity.' To maintain that in every case where an alienation by a limited owner is impeached, legal necessity therefor must be established to support its validity, is to take a narrow and restricted view of the scope of the true rule on the subject. The test is, is the transaction fair and proper, lawful and valid, and justified by Hindu law; necessity is only one of the phases of the test of propriety. This is manifest from the observations of *Sir James Colville* in 13 M. I. A. 209,¹⁹ of *Lord Davey* in 21 All. 71²⁰ and of *Lord Moulton* in 41 Cal. 793.²¹ It is unquestionable then that the widow has a larger power of disposition for religious or charitable purposes or for purposes which are supposed to conduce to the spiritual welfare of her husband than what she possesses for purely worldly purposes. An exhaustive enumeration of these religious or charitable purposes is neither possible nor necessary; but some of them were mentioned by way of illustration in an opinion of *pandits* quoted with approval by *Lord Gifford* in delivering the judgment of the Judicial Committee in 2 *Morley's Digest* 198;²² *Clarke's Rules and Orders*, 1834, p. 91; *Montrieu, Cases on Hindu Law*, p. 477; *Vyavastha Darpan*, Edn. 1, p. 97, Edn. 2, p. 89; religious purposes include dowry to a daughter, building temples for religious worship, digging tanks and the like.' The *pandits* added: 'the widow has a life-interest in both (moveable and immovable property), and is entitled to the enjoyment of the same, and to dispose of the same by gift, mortgage, sale or otherwise for the benefit of her departed husband's soul, even without the consent of her husband's kinsmen, in so doing, she will observe moderation.' We may here refer to some very weighty observations made by *Lord Gifford* on the mode of determination of questions of this character by our tribunals: 'this being a question purely of Hindu law, great care must be taken in coming to a decision upon that subject in order to prevent the judgment of English Judges being warped by impressions made upon their minds in consequence of their habitual application of English law and the nature of English decisions to which they are accustomed; and to consider in what way a Hindu Court of Justice would have decided the point.' These remarks could hardly have been borne in mind in some of the decisions quoted before us. It is not necessary for our present purpose to enter upon a minute analysis of the cases on the subject, but reference may be made to the decisions in . . . 4 All. 482.⁶ These cases generally recognise the doctrine that a Hindu widow, daughter, or mother, is entitled to alienate a small portion of the estate in her hands for religious purpose, though the actual result reached in individual decisions may be open to criticism upon their special facts. In some of these cases, however, a distinction is drawn between acts of which the religious merit is solely acquired by the female heir and acts of which the religious merit accrues to the deceased or is shared by the female heir with him. As *Prannath Saraswati* points out, however,

19. (1869-70) 13 M. I. A. 209 : 3 Beng. L. R. 57: 2 Sar. 518 : 2 Suther 275 (P.C.), *Raj Lukhee v. Gokool Chunder*.
20. ('99) 21 All. 71 : 25 I. A. 183 : 7 Sar. 417 (P. C.), *Sham Sundar v. Achhan Kunwar*.
21. ('14) 1 A.I.R. 1914 P. C. 128 : 41 Cal. 793 : 23 I. C. 162 (P.C.), *Bejoy Gopal v. Girindra Nath*.
22. 2 *Morley's Digest* 198, *Cossinath Bysack v. Hurrosoondry*.

in his erudite Lectures on the Hindu Law of Endowments (p. 167) this distinction is not supported by the texts in the case of the widow, though it may be valid in the case of the daughter or the mother."

[138] After this the learned Judge referred to the texts of Vrihaspati and Vyasa quoted in Dayabhaga and to those of Katyayana quoted in Viramitrodaya and to the dissertations contained in the aforesaid two books as well as in some other original works on Hindu law, and then went on to say:

"[139] The true rule thus appears to be that there is a distinction between legal necessity for worldly purposes on the one hand, and the promotion of the spiritual welfare of the deceased on the other hand, and that, within proper limits, the widow may alienate her husband's property for the performance of religious acts which are supposed to conduce to his spiritual benefit. Tested in the light of these principles, what is the position of the parties here? Shyam Lall Misser had, shortly before his death, founded a temple. His widow raised Rs. 528 by the grant of two perpetual leases with a view to excavate and consecrate a tank and to complete the walls of the temple buildings. The deeds contain recitals that her husband had enjoined her to carry out the works mentioned. These recitals, as pointed out by the Judicial Committee in 36 All. 187,²³ are not by themselves conclusive evidence of their truth, and the facts alleged should be proved *aliunde*. But, obviously' after the death of both Shyam Lall Misser and Puna Koer, independent evidence is not likely to be available for the determination of the question, whether or not the husband gave any specific instructions to the widow. Assume, then, that the alleged instructions have not been proved, still the fact remains that the widow raised money and applied the same for completion of the buildings and for the excavation and consecration of a tank in connexion with the temple. The water of the tank would be needed for purposes of ablution and worship, but, even apart from this the excavation and consecration of a tank are acts of high religious merit, as is authoritatively laid down in a series of texts quoted in the Jalashaotsargatattwa of Raghunandana and the Chaturvargachintamani of Hemadri. Many of these texts, which extol the religious merit of the construction, consecration and maintenance of tanks and other reservoirs for storage of water, are translated by Prannath Saraswati in his tenth lecture on the Hindu Law of Endowments. I feel no doubt what answer a Hindu Court of Justice would have given, if a question had been raised before it as to the propriety and validity of these acts of the widow from the point of view of Hindu law. As Lord Gifford said in 2 Morley's Digest 198,²² it is absolutely impossible to define the extent and limit of the power of the widow to dispose of her husband's property for religious purposes, because it must depend upon the circumstances of the disposition whenever such disposition shall be made and must be consistent with the law regulating such disposition. In the case before us, the disposition has been made for the performance of a work of recognised religious merit and cannot consequently be treated as other than lawful, valid and proper."

[140] The net result of the above observations of Sir Asutosh Mookerjee in my opinion, is that in each case where the question of the validity of a transfer made by a Hindu widow, for a religious or charitable purpose falling short of what has been enjoined by the texts of Hindu law as an essential religious obligation, arises for decision, what the Courts have to enquire is whether the purpose for which the alienation has been made is one which a Hindu Court of Justice might regard as calculated to confer spiritual benefit on the former owner of the property, having regard to the generally prevailing ideas and sentiments of the Hindus of the class to which the deceased belonged. If such a Court could reasonably be expected to regard the purpose to be of such a nature, the alienation should be upheld, provided the property transferred does not constitute an unreasonable fraction of the entire estate, and this irrespective altogether of the consideration whether or not the widow has herself professed to make the transfer for the spiritual welfare of the husband. Even if the widow has either not applied her mind at all to the subject, or has, in fact, made the transfer having merely her own spiritual welfare in view, if the act done by her is of such a nature as, if done by the husband himself, would have conduced to his spiritual welfare, the transfer must be upheld, because, in such a case, in spite of what the widow might say or intend, the husband's soul will share with the wife the religious merit accruing from the act. If, on the other hand, the act is one which is not regarded as capable of conferring any religious merit on the husband,—which the husband himself could not ordinarily be expected to do or which on being done by him could not carry with itself any religious merit—a transfer made by the widow for the purpose of, or in connection with, such an act cannot be upheld, however emphatically she may declare her intention to be to confer spiritual benefit on the husband. It has to be borne in mind that it is not every pious act which is regarded in Hindu law as carrying with it some religious merit, or is looked upon as an act calculated to confer spiritual benefit. For example, a man can acquire religious merit by making presents to his own Guru, to his own parents, to his sister or his sister's issue. He will also acquire religious merit if after his death such presents are made to his Guru, etc., by his widow out of his wealth. In fact a wife has been expressly enjoined to

23. ('14) 1 A.I.R. 1914 P. C. 38 : 36 All. 187 : 23 I. C. 715 (P. C.), Brij Lal v. Mt. Inda Kunwar.

make such presents to the husband's spiritual as well as natural relations. However, he can acquire no religious merit by making presents to his wife's Guru, parents, sister, etc., etc. He will also acquire no religious merit if after his death his widow utilises his wealth in giving presents to her own Guru, her own parents, her own sister, etc., even though she most emphatically declares that the presents had been given for the benefit of his soul. The true test for determining the validity or the propriety of the purpose for which the alienation is made is the nature of the act itself and the incidents attached to it by the Hindu scriptures and the Hindu law-givers and not the declared or the undeclared intention of the widow.

[141] The judgment in 43 Cal. 574⁷ then proceeds to deal with the question whether the area alienated constituted an unreasonably large fraction of the entire estate. Relying on the opinions of the *pandits* in 4 Mac. Sel. Rep. 147²⁴ as to the competency of a widow to alienate three-sixteenth of her husband's property for religious purposes not amounting to religious necessities, and on the decision of the Calcutta Court in 37 Cal. 1,¹⁸ it declares that it did not.

[142] In 41 ALL. 130⁸ (Piggott and Walsh JJ.) the donor Rani Kishori Kunwar, had succeeded to the estate as the mother of her two sons who had died almost in infancy shortly after the death of their father. She gifted about 1/75th portion of the entire estate to two *pandas* of the temple at Jagannath, expressly for the salvation of her husband and his family members and for her own salvation. The gift, although set aside by the lower Court, was upheld by the High Court. It is quite true that, as pointed out by Walsh J. at p. 150 of the Report, whether it was necessary to establish that the intention of the donor was to confer spiritual benefit on the soul of the departed or whether it was sufficient in given circumstances that the object of the deed itself was shown to be religious, did not matter in that case because the lady had clearly put the benefit to her husband's soul and the salvation of other members of his family before her own. However, the learned Judge was clearly of the opinion that the dicta of their Lordships of the Judicial Committee in 8 M. I. A. 529⁵ indicated that in their Lordships' view it was not necessary to establish that the intention of the donor in a particular case was to confer spiritual

benefit upon the soul of the departed and that it was quite enough if in the given circumstances the object of the gift itself was shown to be religious. It has further to be observed that both Piggott and Walsh JJ. cited with approval the judgment of the Calcutta Court in 43 Cal. 574⁷ and were definitely of the opinion that the aforesaid judgment contained a correct exposition of the law.

[143] This judgment of Allahabad Court was affirmed by their Lordships of the Privy Council on appeal, the judgment of their Lordships being reported in 44 ALL. 503.¹³ It may be noted that their Lordships did not find any fault with the interpretation placed by Walsh J. on the dicta in the judgment in 8 M. I. A. 529⁵ nor did they disapprove the considered opinion of Walsh and Piggott JJ. as to the correctness of the law as laid down by the Calcutta High Court in 43 Cal. 574.⁷

[144] In 43 ALL. 463⁹ (Muhammad Rafiq and Stuart JJ.) the reversioners of one Bal Kishan Khattri sued to avoid the dedication by his widow, about sixteen years after his death, of a house inherited by her from him, as a *dharamsala*. The suit was decreed by the Courts below and the High Court, on second appeal, upheld the decree. I do not consider myself called upon, in this case, to express any opinion as to the correctness or otherwise of the decision that the dedication by a Hindu widow of a house inherited by her from her husband as a *dharamsala* (which is usually used as a residing place for travellers) did not amount to a pious act capable of conferring spiritual benefit on the husband, although, with the utmost respect for the learned Judges responsible for it, I must say that I have grave doubt about its correctness. I have, however, no hesitation in expressing my full agreement with the following passage appearing at p. 465 of the Report:

[145] "The learned counsel for Sham Dei contends that this passage lays down a proposition that a widow has authority to alienate a reasonable portion of her husband's property for religious and charitable purposes, whether the alienation is or is not supposed to conduce to the spiritual welfare of her husband. We do not accept this contention. The proposition is not as wide as he would have it. Following an interpretation, which has prevailed since the decision in question was passed in 1861, we hold that in order to justify an alienation by a widow enjoying a widow's estate under the Mitakshara law of a portion of her husband's property for religious or charitable purposes it must be established that the alienation is supposed to conduce to the spiritual welfare of her husband."

24. (1826) 4 Mac. Sel. Rep. 147, Ramchunder v. Gunga Govind.

[146] I am also in respectful agreement with the conclusion of law arrived at by the learned Judges and stated at page 466 as follows :

[147] "The conclusion at which we arrive is this, that unless it can be established that the alienation in question was for the performance of religious acts which were supposed (in this case intended) to be for the spiritual benefit of Bal Kishan, the alienation cannot operate to the prejudice of the reversioners, even if the portion of the property alienated be not excessive."

[148] But I find myself unable, with respect, to endorse the learned Judges' appreciation of the judgment in 43 Cal. 574⁷ which is expressed in the following passage at pp. 465 and 466:

[149] "We are not, however, in accord with the view expressed by the learned counsel for Sham Dei that an act supposed to conduce to the spiritual benefit of the widow is necessarily an act supposed to conduce to the spiritual benefit of the husband. This proposition appears to have been looked at not with disfavour by the learned Judges who decided 43 Cal. 574.⁷ We should not go so far as to say that they accepted it. Whatever be its application to persons governed by the Dayabhaga law, it would not appear to be a doctrine applicable to persons governed by the Mitakshara law. It is obvious that an act done by a widow supposed to conduce to the spiritual benefit of her husband would confer spiritual benefit on herself, but the converse does not appear to follow. An act done by the widow supposed to conduce to the spiritual benefit of herself would not confer spiritual benefit on her husband. In any circumstances we should have been precluded from accepting this view in face of the decision in 4 All. 482.⁶

[150] It is quite true that an act supposed to conduce to the spiritual benefit of the widow need not necessarily be an act supposed also to conduce to the spiritual benefit of the husband, and instances are conceivable of acts supposed to conduce to the spiritual welfare of the widow herself which are not regarded as capable of conferring any spiritual benefit on the soul of the husband. One such instance is the case, already mentioned, of a present made by the widow to her own Guru. The judgment in 43 Cal. 574⁷ also does not lay down that an act supposed to conduce to the spiritual welfare of the widow is always conducive to the spiritual welfare of her husband. However, as I have already indicated in my discussion of the relevant passages in the original text-books on Hindu law, and as pointed out in the aforesaid judgment on the authority of some of those passages, very generally the soul of the deceased husband is believed to share with the widow the religious merit accruing from pious acts done by her. This belief is the logical result of the generally accepted theory of the wife being only a part of the

husband's own self, the two sharing the fruits of the good and evil acts of each other. And in this respect no distinction can at all be made between the Dayabhaga law and the Mitakshara law. So far as I am aware, there is no difference between the two schools respecting the restrictions inherent in the estate of a Hindu widow succeeding her husband, nor is there any warrant for the assumption that the approach of the two schools to the question of the husband and the wife participating in the effects of good and evil actions of each other is not the same. The references to the text of Dayabhaga in the judgment in 43 Cal. 574⁷ are really not references to something said by Jimuta Vahana (the author of Dayabhaga) himself but they are, in fact, references only to the text of Brihaspati and Vyasa quoted by him and these texts are of incontestable authority even in the Mitakshara school. In Viramitrodaya which is a book of undoubted authority under both the Benares and the Bombay schools of Mitakshara, a rule similar to that to be found in the Dayabhaga is expressly stated and, if anything, in much clearer language than that used by Jimuta Vahana. Viramitrodaya in fact appears to take the view that a gift by a widow for pious purposes is always conducive to the spiritual benefit of her husband. Reference may be made in this connection to the relevant passage already quoted by me. The reason why in the text of the Mitakshara itself no reference has been made to the widow's sharing with the soul of her husband the fruits of all pious acts performed by her has also been explained above. The parties concerned, in 43 Cal. 574⁷ were themselves governed by the Mitakshara law. Under the circumstances I cannot find any justification at all for the learned Judges in the Allahabad case trying to confine the operation of the doctrine adumbrated in 43 Cal. 574⁷ to persons governed by the Mitakshara law.

[151] Be that as it may, whether the learned Judges' appreciation or criticism of the judgment in 43 Cal. 574⁷ is or is not sound, they have nowhere laid down that unless the widow is proved to have made the transfer with the express or avowed object of conferring spiritual benefit on the husband, such transfer cannot be upheld. Their judgment cannot, therefore, be regarded as any authority for the view that the transfer by a widow, in order to be valid, must be proved to have been made

expressly and avowedly for the spiritual welfare of her husband.

[152] In 4 Lah. 336¹⁶ (Fforde and Abdul Raoof JJ.) the last male holder of the property gifted, which comprised more than one-fourth of his entire estate, was an Arya-Samajist. His widow made the impugned gift to the Kooka sect of the Sikhs in the name of Granth Sahib. In the deed of gift the donor declared that the property gifted was owned and possessed by her absolutely. During the course of the trial of the suit brought by the reversioners of her husband to avoid the gift she made several conflicting statements as to the object of the gift, some of which were wholly inconsistent with the gift having been made for the spiritual benefit of the husband. The plaintiffs' suit was decreed by the High Court and the gift was held to be invalid on the ground that it had been made for the husband's spiritual welfare. Fforde J. also expressed the view, although he refrained from finally deciding it, that the property gifted could not be regarded as either a reasonable or a moderate fraction of the entire estate. On the facts found, the conclusion of the learned Judges as to the gift not being one made for the spiritual benefit of the husband seems to be wholly unexceptionable. A gift made to the Kooka sect of the Sikhs in the name of the Granth Sahib could not reasonably be supposed by any one to conduce to the spiritual benefit of an Arya Samajist. I, however, do not find it possible to endorse some of the reasons given by the learned Judges in support of the conclusion. The following observations were made by Fforde J. towards the close of his judgment with which Abdul Raoof J. evidently concurred :

[153] "This judgment which is in agreement with the views expressed in the Privy Council decision already referred to finally disposes of the last argument of the respondent. I have no doubt that it must now be held to be the law that a gift by a Hindu widow of a moderate portion of her deceased husband's estate can only be valid if it is expressly made for the spiritual welfare of the deceased. A gift however pious or meritorious cannot be enforced against the reversioners unless it is proved to be made with that object and unless that purpose is deemed by the Hindu religion to be fulfilled by the character of the gift in question."

[154] The view of the learned Judge that a gift by a Hindu widow of a moderate portion of her deceased husband's estate must, in order to be valid, be expressly made for the spiritual welfare of the husband, and that a gift, however pious or meritorious, cannot be enforced against the

reversioners unless it is proved to have been made with that object, does not receive any support either from the Privy Council judgment in 8 M. I. A. 529⁵ or from any of the other judgments mentioned by him, and I fail to see on what authority his dictum as to there being no doubt that the law was as stated by him is based. The judgment of the Allahabad Court in 43 ALL. 463⁹ on which he mainly relies, and which he professes to follow in preference to the judgment of the Calcutta High Court in 43 Cal. 574,⁷ certainly does not lay down any such law. Apart from the fact that it is not supported by any authority, the view, I must say, with all respect, is not otherwise sound and runs counter to the notions of Hindu lawyers of recognised authority. According to those notions, as also according to the view consistently held by their Lordships of the Judicial Committee as well as by the Courts in India, if the purpose of a gift is proved to be such as is supposed by the Hindu lawyers, or by the prevalent Hindu religious sentiments, to conduce to the spiritual welfare of the deceased, that is quite enough to uphold the gift, and the Courts are not required to go further and enquire if the widow herself made the gift expressly for that purpose.

[155] I must also express my respectful disagreement with the observations appearing at p. 339 of the report in which Fforde J. appears to be inclined to the view that a gift amounting to one-fourth of the inheritance cannot be reasonably or fairly held by any Court to be a gift of a small fraction of the property. As has been observed in some of the judgments already referred to, it is not possible to lay down any hard and fast rule as to the proportion which in any given case, the property transferred by the widow may reasonably bear to the entire estate, and the question must be left to be determined in each case with reference to the circumstances of that particular case.

[156] In 5 Pat. 646¹⁰ (Jwala Prasad and Bucknill JJ.) the decision of the case turned upon the validity or otherwise of a deed of gift executed by the widow of one Banarasi Prasad by which she transferred some immovable property to her son-in-law on the occasion of a certain ceremony connected with the marriage of her daughter. In a very elaborate and illuminating judgment written by Jwala Prasad J., in which all the relevant original texts of almost all authoritative works on Hindu law were considered and discussed, the Bench upheld the gift.

At p. 676 of the Report, the following observations are to be found which contain a very lucid exposition of the position of a Hindu widow under the Mitakshara school of law :

[157] "She, thus succeeds as any other male member to the entire estate of her husband and takes possession of it as an absolute owner thereof. Her interest is not in any way limited nor does she hold a life estate only as sometimes it is supposed to be. Only her power of disposition is a qualified one and is analogous to the power of a male coparcener in a joint Mitakshara family, and the reason of this is in the nature of her relationship with her husband. She is supposed to be half the body of her husband and confers so much temporal and spiritual benefit on her husband as half of his own body does and associates with him in the performance of religious sacrifices ; Smritichandrika, Chap. 11, para. 6. A lawfully wedded wife is called 'patni' as a correlative of the term 'pati.' The marriage is attended with nuptial rite and the object of such a marriage is to enable the husband to offer sacrifices and to discharge his religious duties and to beget a son unto him in order that he may be delivered from the hell called 'put' to which the shades of a sonless man, according to Hindu ideas, descend: A man is enjoined by the Sastras to marry a wife as his last Sanskara or religious rite. During the lifetime of the husband the wife acquires ownership of a dependent character and on his demise she obtains independent power over it. . . . She takes the entire estate of her husband and is enjoined to perform acts calculated to increase the prosperity of her and her lord, such as, performing sraddhas, digging wells, etc., and giving presents with pious liberality in proportion to the wealth inherited by her. Thus, the performance of religious and charitable purposes and acts conducive to the welfare of her husband are the objects for which she takes the estate of her husband. Accordingly, Smritichandrika in Chap. 11 says that she possesses independent power of making gifts for religious and charitable purpose, for such gifts 'her husband even if wanting a son shall reach the heavenly abodes,' and for purposes not being religious or charitable but purely temporal, such as, gifts to dancers, etc., she has no independent power."

[158] From these observations, it appears that Jwala Prasad J. fully agreed with the view of Sir Asutosh Mookerjee, expressed in 43 Cal. 574,⁷ as to the spiritual merit accruing from the pious acts performed by the widow out of her deceased husband's property being shared equally by the soul of the husband and herself, even where the act is professed to be performed by her for her own spiritual benefit.

[159] The conclusion finally arrived at by the learned Judge is summed up by him in the following para occurring at p. 696 of the Report:

[160] "Now, gifts of a small portion of the property of the deceased are permissible by a widow even if it is not for the performance of the strictly religious duties such as are expressly enjoined by the Sastras, provided the gifts are made upon the

occasions which are conducive to the spiritual welfare of the deceased."

[161] This passage quite unambiguously and unmistakably shows that, in the view of the learned Judge, one test to be applied in determining whether or not a gift by a widow of a small portion of the property of her deceased husband is valid is the occasion of the gift. If a gift made on such an occasion is regarded by the Hindu Sastras, or by the commonly prevailing Hindu religious notions, as conducive to the spiritual welfare of the deceased, the gift will be upheld, whether or not it purported to be made with the object of conferring spiritual benefit on him.

[162] In 10 Pat. 352¹² (Ross and Dhavle JJ.) one Mt. Lakhpati Kuer, widow of one Surjan Singh, transferred some property by means of a *samarpannama* or deed of dedication to two deities, Sree Thakurji Mahraj and Sree Sheoji. By means of another deed executed the next day, she appointed her nephew's widow, Mt. Rajdulari Kuer as a shebait in succession to herself. In the deed of endowment Mt. Lakhpati Kuer referred to a temple which she had already built and said :

[163] "It is quite necessary for me, for my welfare and salvation in the next world, to make a permanent arrangement for the service, worship, rag-bhog and occasional festivities of the gods installed in the said temple"

[164] On a suit brought by the reversioner to avoid the above-mentioned alienation, along with some other alienations effected by the widow, the dedication was upheld by the learned Subordinate Judge as coming within the power of a Hindu widow *bona fide* to alienate a reasonable portion of the property of her husband for his spiritual benefit. On appeal, it was contended by the plaintiff that the dedication was not binding on the reversioner because Mt. Lakhpati Kuer made it without any reference to the spiritual good of her deceased husband and resorted to it merely as a cloak for setting the property on the widow of her brother's son as a shebait. The High Court accepted the appeal and decreed the plaintiff's claim. The grounds of the decision are thus stated at pp. 373 and 374 of the Report:

[165] "The dedication is thus open to a number of objections. In the first place, Lakhpati's alienation of Jamalpur for the installation of the deities having been set aside as beyond her power as a Hindu widow, it would seem somewhat inconsistent to hold that it was within her power to dedicate the property now in question for the service of the same temple, especially as she clearly acted without any authority from her husband and

further purported to make the alienation for her own 'welfare and salvation in the next world.' Secondly, a Hindu widow's alienation for such purposes must be 'within proper and reasonable limits.' The limits can only be determined with reference to all the circumstances. At the time Lakhpati Kuer made the dedication she had already alienated all the properties that came to her from her deceased husband save and except the raiyat-khana lands and the homestead of which she made a gift to Mt. Rajdulari the very next day after expressly referring to the fact that she had previously executed a will in 1896, in favour of Jadunandan Singh, which had failed on account of his death and to Rajdulari's want of means. The learned Subordinate Judge has found that dedication covered a little less than 1/5th of the total estate and that this proportion cannot be regarded as unfair and unreasonable. In doing so, however, he has taken into account mauza Jamalpur with a net income of Rs. 1,100 and mauza Pipra with an income of Rs. 700 (out of a total income of Rs. 2,995), which, as matters stood at the time, were already lost to the estate, if indeed anything could properly be said to have been left for the reversion after Lakhpati converted herself into an absolute proprietress. Half of mauza Pahari with an income of Rs. 535 was also gone from the estate as matters stood at the time. Mt. Lakhpati Kuer had at the time of this dedication properties bringing an income of Rs. 660 only and out of this she dedicated properties with an income of Rs. 535. This seems a very high proportion to apply for religious purposes not of an obligatory character; and the smaller proportion of 1/5th or so found by the learned Subordinate Judge is also not easily justifiable in the circumstances of the case. Mt. Lakhpati Kuer had already converted herself into an absolute proprietress and the dedication was so shortly after followed, by the gift of the rest of the estate to Mt. Rajdulari that it may be fairly inferred that her object was to leave for the reversion nothing out of the properties of which she had purported to make herself the absolute proprietress."

[166] It will be observed that the judgment proceeds really on the particular facts of the case and nowhere lays down that, in order to come within the power of a Hindu widow to alienate a reasonable portion of her husband's estate for a religious or charitable purpose, a gift by her should be expressly made for the husband's spiritual welfare. In the deed of settlement no reference had been made to the spiritual welfare of the husband and, on the other hand, the dedication expressly purported to have been made for the settlor's own salvation and spiritual welfare. If the learned Judges were of the view that a gift made by a Hindu widow, not with the avowed object of conferring spiritual benefit on the husband but for her own spiritual benefit, could in no case conduce to the spiritual welfare of the husband, they could have at once set aside the dedication on that short ground. This, however, they did not do. They rested their decision in decreeing the suit on two grounds:

(1) that the alienation made for the installation of the deities having been already set aside in another case a dedication of property for the service of the same temple in which those deities had been installed would not be upheld and (2) that the property dedicated comprised the bulk of the property in the possession of Mt. Lakhpati Kuer at the material time. It is of course true that, in developing the first ground mentioned above a reference has also been made to the circumstance of her having made the dedication without any authority from her husband, and also to the circumstance of her having purported to act for her own welfare and salvation in the next world.

[167] I may note here that in the course of the judgment, reference was also made to the judgments of the Calcutta and Lahore High Courts discussed above and also to some of the original texts. Dhavle J., who wrote the judgment, was, after a consideration of the original authorities and particularly the text of Brihaspati, personally inclined to the view that it was difficult to see how it was possible for a Hindu widow to aim at any spiritual good for herself in which soul of her deceased husband would not participate. However, in view of his interpretation of some of the earlier decisions, he hastened to add that it was perhaps too late in the day to go back to the texts and that in the particular case before him it was not absolutely necessary to do so. With all respect to the learned Judge, I do not think those decisions, except in 4 Lah. 336,¹⁶ have really drifted very far away from the texts although somewhat loose and ambiguous language has been used in some places. In the Lahore case the actual decision was perfectly in accord with the rule of law laid down in those texts although some observations were made which run counter to them.

[168] In 10 Pat. 474¹¹ (Jwala Prasad and James JJ.) the widow of one Ramji Jha mortgaged some property to raise a sum of Rs. 1000 for purposes of excavating and consecrating a tank. There was no recital in the mortgage bond that the tank was to be excavated for the spiritual benefit of the husband. On a suit brought by the reversioners of Ramji Jha the learned trial Judge upheld the mortgage but the learned District Judge set it aside. On second appeal the decree of the District Judge was set aside and that of the trial Court dismissing the suit restored. In delivering the judgment

of the Bench Jwala Prasad J. made the following observations which appear at pp. 477 and 478 of the Report:

[169-170] "The learned District Judge is perhaps under a misapprehension that the widow, in order to justify an alienation, must show that the digging of a tank and the building of a temple, etc., were done either under the express direction of her husband or expressly for the benefit of the soul of her husband. In this to my mind the learned Judge has erred, and the reply is given by Mookerjee and Newbould JJ. in 43 Cal. 574⁷ where the recitals in the bond to the effect that the husband of the widow had enjoined her to carry on the digging of a tank and its consecration were not proved. Their Lordships say: 'Assume, then, that the alleged instructions have not been proved, still the fact remains that the widow raised money and applied the same for completion of the building and for the excavation and consecration of a tank in connection with the temple. The water of the tank would be needed for purposes of ablution and worship; but, even apart from this, the excavation and consecration of a tank are acts of higher religious merit, as is authoritatively laid down in a series of texts. In the case in 7 Pat. L. T. 821¹⁰ the texts on the subject of almost all the Rishis were quoted and it was shewn that the Rishis laid down that a widow takes the estate of her husband solely for the good of his soul, and her power to spend the income of the estate or to alienate the entire estate would be valid provided it is done for the good of her husband's soul. She takes an absolute estate of her husband for that purpose.'

[171] In this case the question was whether a transfer made by a widow for a religious or charitable purpose of a reasonable portion of the husband's estate could be upheld as beneficial to the soul of her deceased husband, even through the act was not done either under the express direction of the husband or expressly for the benefit of his soul, and it was answered in the affirmative.

[172] The next case to which our attention was drawn at the Bar was that in A. I. R. 1937 Pat. 78¹⁵ (*Dhavle and Agarwala JJ.*). The suit was for setting aside a *wakfnama* by which the widow of one Mathur Lal Singh dedicated certain properties, yielding a yearly income of Rs. 600 to a *thakurbari* which, according to the deed, had been erected and *pujas* and *sevas* instituted by Mathur Lal Singh himself. The deed spoke of the endowment being made in accordance with the wishes and oral instructions of Mathur Lal Singh. The Subordinate Judge, who tried the suit, found that the defence story as to the endowment having been made in accordance with the desires of Mathur Lal Singh was neither more nor less than a myth; that contrary to the statement in the deed, there was no temple built by Mathur Lal Singh himself, and

that though the widow Mt. Pankhawati had constructed a temple, it had not been shown that she did that for the spiritual welfare of her husband. It was further held that the *wakfnama* had been executed under the influence of the widow's manager, Nanihal with the real object of assigning some properties to his minor son, Raghunath, who had been living with her and was being maintained by her. It was also found that the portion of the property dedicated was in excess of the power of a Hindu widow to alienate for the spiritual benefit of her husband. On these findings, the endowment was held not to be binding upon the plaintiffs and their suit was decreed. On appeal, the learned Additional District Judge held the endowment to be valid and reversing the decree passed by the learned trial Judge dismissed the plaintiffs' suit. On second appeal, the decree of the learned trial Judge was restored. In delivering the judgment of the Bench Dhavle J. made the following observations which appear at p. 80 of the report:

[173] "The learned Judge also shows a misconception of the plaintiffs' case when he finds that Ex. 4 is not a sham document as the temple and the deity 'are genuine and do exist,' for this is not what was ever denied by the plaintiffs. He speaks of three classes of cases in which a Hindu widow can alienate her husband's property: (1) for legal necessity; (2) for the spiritual necessity of her deceased husband; and (3) for acts "which are calculated to confer spiritual benefit on his soul." He accepted the defence contention that the *wakfnama* came under the third category, but he did not notice that that deed makes no reference to the spiritual benefit of the deceased husband of the lady. He did himself (as I have already indicated) disbelieve in agreement with the lower Court, such statements in the deed as that her husband had erected the temple and established *pujas* and *sevas* there, and that he had instructed her orally to dedicate some property for its upkeep, which was the justification made out in the deed itself for the alienation of the property, but he nevertheless upheld the alienation on the authority of 43 Cal. 574.⁷ That, however, was not a case where the alleged instructions of the husband were found to be untrue. There was, moreover, in that case a temple founded by the husband, and the widow had by the leases impugned raised money for the excavation and consecration of a tank and the erection of a wall in connection with the temple. And the alienations were not (as here) in favour of one possible reversioner in preference to others—the lessee was a Singh while the lady belonged to a Misra family. The excavation and consecration of the tank in connection with the temple founded by the husband stand on a very different footing from the temple in this case which was built years after the husband's death and was, so it has been found as a fact, falsely attributed to the husband. The law is well settled that it is not competent to a Hindu widow to alienate any portion of her husband's property for

her own spiritual benefit, especially where it is accompanied by a temporal benefit to one of the possible reversioners to which he was not entitled."

[174] The decision of this case evidently proceeds on its own peculiar facts. It is true that the learned Judge has used the following words :

[175] "But he did not notice that that deed makes no reference to the spiritual benefit of the deceased husband of the lady."

[176] But I do not think that he really meant to lay down that, even if the purpose of the gift had been in its nature such as could be supposed to conduce to the spiritual welfare of the husband, the mere absence of reference to such welfare in the deed would have been fatal. To take such a view would have brought him in direct conflict with the judgments of two other Benches of his own Court in 5 Pat. 646¹⁰ and 10 Pat. 474¹¹ to which he did not even refer. Such a view would also not be in consonance with his own view in 10 Pat. 352.¹² His reference to the judgment in 43 Cal. 574⁷ does not show that he disapproved, or dissented from the propositions laid down there, although in stating "That, however, was not a case where the alleged instructions of the husband were found to be untrue" he seems to have lost sight of the fact that the discussion in the judgment proceeded on the distinct assumption that the alleged instructions had not in fact been given by the husband. The emphasis laid on the real intention of the widow to confer a temporal benefit on a favoured reversioner to which he was not otherwise entitled indicates that the learned Judge did not think that the endowment could be vacated merely by reason of the widow not having made the same expressly for the purpose of conferring spiritual benefit on her late husband.

[177] In *Mayne on Hindu Law and Usage*, Edn. 10, edited by S. Srinivasa Iyengar, late Advocate-General of Madras, the law on the subject of alienations by widows for religious and charitable purposes not constituting essential religious obligations is thus stated in para. 645 at p. 781 :

[178] "Pilgrimages and sacrifices performed by a widow are pious acts conducive to the spiritual welfare of her husband provided the expenditure is within reasonable limits. It has been held in some cases that a widow is not authorised to sell her husband's property for pious and religious purposes intended to secure her own spiritual welfare. But the distinction between acts of which the religious benefit is solely acquired by the female heir and acts of which the religious merit accrues to the deceased or is shared by her with him cannot be sustained in the case of the widow, whether or not it is valid in the case of the daugh-

ter or the mother : for the wife is associated in all the religious offerings and rituals with the husband and this mutual relation is not dissolved by the death of either. Brihaspati says : 'In Scripture and in the Code of Law, as well as in popular practice, a wife is declared by the wise to be half the body of her husband equally sharing the fruit of good and evil acts.' On this point, the true principle is stated by Mukherjee J., in 43 Cal. 574⁷ by Dhavle J., in 10 Pat. 352¹² and by Venkataramana Rao J. in A. I. R. 1936 Mad. 677.²⁵"

[179] I may note that I have referred to the last mentioned case but have refrained from discussing it because it throws no light on the questions that we in this reference are called upon to answer. The following observations in foot-note (c) at p. 781 are also of importance. After referring to 4 ALL. 482⁶ and a number of other cases including 4 Lah. 336,¹⁶ the learned author says :

[180] "Though some of these decisions can be supported on the ground that the alienations were not within proper limits or in accord with the common notions of Hindus, they cannot be supported on the view that they were only concerned with the spiritual welfare of the widow which is inseparable from her husband's spiritual welfare."

[181] The exposition of law contained in the above quoted two passages is generally and substantially correct, although, as I have pointed out above, there may be some acts, pious in themselves, of which, when performed by the widow, the spiritual benefit cannot and will not accrue to the husband, whether or not such benefit can or will accrue to the widow herself being a question on which it is not necessary to express any opinion. One example of such an act has already been given by me. Barring pious acts of such an exceptional nature, the spiritual benefit of religious and charitable acts done by the widow is, according to the view laid down by Sir Asutosh Mookerjee in 43 Cal. 574⁷ and now generally accepted, necessarily shared by her with her deceased husband.

[182] In summing up the conclusions which in my judgment are deducible from the authorities discussed above I may say that in every case where a gift or any other transfer by Hindu widow is sought to be supported on the ground that, although not made in or for the performance of acts or observances which are regarded as essential religious obligations, the transfer was beneficial to the soul of her deceased husband, two questions fall for decisions. The first question is whether the transfer has been made for a religious or charitable purpose which is supposed (by Shruti i. e., the Scripture, Smriti i. e., text-books or sada-

25. ('36) 23 A.I.R. 1936 Mad. 677 : 165 I. C. 632, Krishnamurthi v. Lingayya.

char i. e., rules of conduct recognised generally by the society) to conduce to the spiritual welfare of the husband. The second question is whether the property covered by the transfer constitutes a small or reasonable portion of the entire estate. In dealing with the first question, the Court should have regard to the purpose for which the gift has been made, or to which the proceeds of the transfer have been applied, and the religious merit which, according to Hindu religious notions, attaches to the same. The question to be determined in each case is whether the purpose is one which is regarded by the Hindu religion, or the particular sect to which the deceased belonged, as one calculated to confer spiritual benefit on him, and not whether the widow herself regarded it as efficacious to confer such benefit. If the answer to this question is in the affirmative, the act must be upheld as conducive to the spiritual benefit of the previous owner, whether or not the widow has purported to do it with the object of conferring such benefit on him. If, on the other hand, the nature of the act itself is such that, according to the common notions of Hindu religion, it cannot confer any spiritual benefit on the husband, whether or not it confers such benefit on the widow herself, any kind of declaration by the widow as to the act having been intended by her to confer spiritual benefit on the husband will not alter its nature and make it conducive to his spiritual welfare. In the generality of cases, although possibly not invariably, pious acts done by the widow are supposed to conduce to the spiritual welfare of both. An important test to apply, in order to find out if a particular act is of this description, is to see, if the act is one which could have been done by the husband himself during his own lifetime to acquire religious merit, or is one which has been expressly recommended by the text-books to be done by a widow for the benefit of the husband's soul. Another useful test may be the occasion on which a particular act is done. It is either the nature of the act or the occasion on which it is performed that is the determining factor in deciding whether an alienation made in or for doing the act is to be upheld as one calculated to conduce to the spiritual benefit of the husband and not the declaration made by the wife herself as to the purpose or object of the act or the transfer.

[183] As for the second question, namely, whether the property actually transferred

for charitable or religious purposes of the type sanctioned by the law is, in any particular case, no more than a reasonable or a moderate portion of the entire estate of the husband, it is not possible to lay down any absolute rule of universal application. Each case must be decided with reference to its own facts. In each case the Court will be called upon to consider the extent of the estate in the possession of the widow, the number of persons she by law is bound to maintain or to provide for, the nature of the religious or charitable act proposed to be performed, and possibly also the precise relationship to the deceased of the presumptive reversioners. Where the estate held by the widow is very large and yields very considerable income a comparatively smaller proportion of the entire estate may be deemed to be such a reasonable or moderate portion as can be validly transferred by her for pious purposes not amounting to spiritual necessities. Where, however, the estate is small, the transfer of a comparatively larger proportion may have to be upheld. Similarly where the number of dependents is large, the transfer of a very small proportion of the estate may be permissible whereas in cases where the number of dependents is very small, a larger proportion of the estate may justifiably be alienated. The texts have repeatedly forbidden what is called *apahara* of the property which literally means 'theft' but which has been interpreted to signify 'waste.' These texts may be taken to furnish a useful guide and the Court may in a given case reasonably consider whether or not the transfer amounts to an *apahara* of the husband's property designed to destroy the reasonable expectations of the reversioners or is a *bona fide* arrangement or a *bona fide* transfer for a genuinely pious purpose. There may be cases, and the present appears to be one of such cases, in which one-fourth or even a little more, of the husband's estate may be legitimately transferred for such a purpose.

[184] With the above observations I would answer the first question referred to this Bench in the negative and the fourth question in the affirmative.

[185] Coming now to the second question, a Full Bench of five Judges of this Court in Regular Second Appeal No. 103 of 1943²⁶ has held that the Punjab custom confers no power of gift on a widow in respect of her

26. Reported in ('46) 33 A. I. R. 1946 Lah. 180 : 223 I. C. 20 (F. B.), Ali Mohammad v. Mt. Mughlani.

husband's estate. It only permits alienations for necessity provided the requirements of the widow cannot be met out of the income of the estate in her possession. In view of this pronouncement it is not necessary for me to enter into any lengthy discussion of the interpretation to be placed on Exception 6 to Para. 59 of Rattigan's Digest of Customary Law. In my order of reference, which was written before the above mentioned Full Bench judgment was delivered, I pointed out that para. 59 as well as Exception 6 thereunder related only to the cases of male proprietors and did not cover cases of gifts by widows or other female owners. I also pointed out that the paragraph added under Exception 6 in Mr. Rustomji's edition of Rattigan's Customary Law was not based on any authority except that in 10 Lah. 613¹ which in its own turn was based on the original text of Exception 6 which for reasons already stated had been wrongly assumed therein to be applicable to the cases of widows. The correctness of the view expressed by me in the order of reference was not challenged by either party at the hearing of this reference. In view of this fact as well as in view of the recent pronouncement of the Full Bench, it may be taken that no custom on the subject of gifts by widows either *simpliciter* or for religious or charitable purposes exists. We have, therefore, necessarily to seek guidance from the principles of Hindu law, it being well settled that in cases where there is a gap in custom, such gap must be filled in by reference to the personal law of the parties. It is equally well settled that the position of a widow, and the nature and the incidents of her tenure, under custom are exactly identical with those under the Hindu law. Reference may, in this connexion, be made to 10 Lah. 613¹ and 5 Lah. 450⁴ and also to the pronouncement of the Full Bench in the case mentioned above, Regular Second Appeal No. 103 of 1943,²⁶ where the principles of Hindu law as governing a widow's power in the matter of gifting away her husband's estate in her hands were applied to the case of a Mahomedan widow succeeding to the property of her husband under the Customary law of the province. For these reasons I would answer the second question in the affirmative.

[186] In view of the answer proposed by me to the second question, the third question does not arise.

[187] **Abdul Rashid Ag. C. J.**—I agree.

[188] **Mehr Chand Mahajan J.**—I also agree.

[189] **By the Court.** — This case will now be laid before the Single Bench for final disposal.

K.S.

Answer accordingly.

[Case No. 70.]

A. I. R. (33) 1946 Lahore 380

RAM LALL AND BHANDARI JJ.

Shamira Mandu — Convict-Appellant
v.

Emperor.

Criminal Appeal No. 83 of 1945, Decided on 11th June 1945, from order of Addl. Sessions Judge, Mianwali at Jhang, D/- 10th January 1945.

(a) **Criminal P. C. (1898), S. 288**—Statement before Committing Magistrate transferred to Sessions record — Corroboration as matter of law is not required — If Judge is satisfied that witness's statement before Committing Magistrate was true he can act upon it.

A statement of a witness made before the Committing Magistrate duly transferred to the Sessions record under S. 288 is substantive evidence for all purposes but as a matter of caution requires corroboration. The corroboration can be found in the circumstances surrounding a case and corroboration as a matter of law is not required. The credit to be given to the statements of a witness is not a matter regulated by rules of procedure. When a judge has before him evidence which is substantive evidence without limitation the only test that has to be applied is the test laid down by S. 3, Evidence Act. The fact that a witness has resiled from his earlier statement is a fact to be taken into consideration in giving value to the statement that a Judge eventually relies upon. If with that circumstance in mind the Judge still thinks that the earlier statement is true then it is his duty to act upon it whether that statement is corroborated by independent evidence or not: *Case law considered.* [P 382 C 1, 2; P 383 C 1]

Cr. P. C. —

(46) Chitaley, S. 288, Notes 7 and 8.

(41) Mitra, para. 899.

(b) **Criminal P. C. (1898), S. 288** — Section deals with admissibility of evidence and not with weight to be attached thereto. (*Per Bhandari J.*)

Section 288, enables the earlier deposition to be treated as substantive evidence in the case and not merely as evidence useful for the purpose of impeaching the credit of the witness. The marginal note makes it plain that the section deals with the admissibility of the evidence and not with the weight to be attached thereto. [P 385 C 2]

Cr. P. C. —

(46) Chitaley, S. 288, N. 7, Pt. 1.

(41) Mitra, Paras. 898 and 899.

Dr. Kh. Shuja-ud-Din and Mohd. Jamil —
for Appellant.

Bhagwan Das Mehra and Jamil Asghar for
Advocate-General — for the Crown.

Ram Lall J. — Shamira, son of Mandu, caste Mussali, of village Rajoa in the

jurisdiction of police station Chiniot in the Jhang district was convicted by the learned Additional Sessions Judge, Lyallpur, for the double murder of his wife and his sister and sentenced to death. He has appealed to this Court and the sentence of death is also before us for confirmation under S. 374, Criminal P. C. The appellant Shamira is the first cousin of one Mammi. Mammi's sister Mt. Fateh was married to Shamira and Shamira's sister, also called Mt. Fateh, was married to Mammi. The two marriages were what are known as exchange marriages and took place about three years before the occurrence. The character of both these girls is alleged to have been not good and it is for this reason that Shamira is stated to have murdered both of them on the morning of 25th August 1944, at *sehrgiwela*. Village Rajoa is at a distance of six miles from the police station. At 7 A. M., on the morning of 25th August 1944, Mammi lodged a first information report which is to the effect that he lives with his wife in the same *ahata* as Shamira accused. He said that the character both of his sister and his wife was bad. He went to bed in his own house and at *sahri* time he made a light when Shamira entered with *chhavi* and inflicted a serious blow on the neck of his wife, i.e., the appellant's sister while she was still lying on her bed. An alarm was raised and a good number of people living in the *ahata* came up. On enquiries made by these persons whose names are given Shamira confessed of having killed not only his sister but also his own wife because they were leading an immoral life. Mammi with others then went to the neighbouring house of Shamira and there found his wife Mt. Fateh also lying murdered.

[2] The police commenced investigation immediately and apparently concluded it within a few hours. The Sub-Inspector then interrogated the appellant who said that he had thrown his hatchet into a sugar-cane field belonging to Sardar Hussain Shah and from this field a bloodstained hatchet was recovered. A complete chalan was put before the Committing Magistrate the next day and on 26th statements of a good many of the witnesses for the prosecution were recorded by the Committing Magistrate. At the trial nearly all the witnesses for the prosecution went back on their earlier statements with the result that these statements were transferred to the Sessions record under the provisions of S. 288, Criminal P. C. Mammi too attempted to resile from

his statement but eventually on cross-examination by the Public Prosecutor reverted to his old statement. Mammi's statement at the trial was, to begin with, that shortly after *sehrgiwela* he was informed of the murder of his wife and on coming home found her dead, but he did not see the murder being committed. When cross-examined by the Public Prosecutor he said that he had been beaten by the Sub-Inspector into making a contradictory statement before the Committing Magistrate. He, however, said that it was correct that at *sehrgiwela* he had just got up from his bed while his wife was still asleep on her charpoy when Shamira appellant entered the courtyard with a hatchet in his hand and struck the witness's wife on the neck. An immediate alarm was raised by him when a number of persons, namely, Sohna, Sukha, Baqri, Barkha, Rehman and others turned up. When these persons came the appellant was still standing by the bedside of the murdered woman with a hatchet in his hand and on being questioned he admitted that he had already killed his wife and had now killed his sister because both were women of loose character. He goes on to say that immediately after having made this confession, the appellant ran away with his hatchet and the witness fetched the Chaukidar from his house and then proceeded to the police station to make the first information report, which he admitted contained a correct version of the occurrence. In cross-examination by counsel for the appellant the witness said that the Sub-Inspector had brought him and the other witnesses to Chiniot and produced them before the Magistrate where their statements were recorded the next morning. He went on to say that the Sub-Inspector told him and the other witnesses that if they did not make statements in accordance with the statements which were read out to them (presumably their police statements) the witnesses would be sent to jail. In his statement before the Committing Magistrate, he said that a lantern was burning when the appellant came inside his house with a *kulhari* and gave a blow to the witness's wife on the neck while she was still lying down. On his cry a number of persons came up and to them the appellant confessed not only to have committed this murder but to have also killed his wife previously. It was then that he along with the Chaukidar went to the *thana* to lodge the first information report, but before going there he had seen the dead body of his

own sister lying on a cot in the appellant's house. He further said that there were many complaints with regard to the character of both his wife and his sister. Sohni son of Kohri, Sukha son of Sohni, Sukha son of Buta, Baqri son of Sada, Rahman son of Qadu, Bakha *alias* Bakhra son of Sohna and Roshan son of Nuqra, all Musalis, living in this or the neighbouring *ahata* made statements to the Committing Magistrate to the effect that they came up on a cry being raised, saw the appellant with a hatchet in his hand and that the appellant confessed to them having committed a double murder. At the trial all these witnesses stated that their previous statements were the result of police pressure.

[3] The post-mortem examination of the two dead women leaves no room for doubt that whoever inflicted these injuries on them intended to cause death and, therefore, if the identity of this person can be ascertained without reasonable doubt that person is clearly guilty of the offence of murder. The only question that arises in this case is whether a conviction can safely be based on the evidence of witnesses who have made one statement before the Committing Magistrate and have either diluted that statement at the trial or have completely gone back upon such statements. Learned counsel for the appellant addressed us at considerable length about the legal position in the case but he did not seriously contest the position that if the earlier statements made before the Committing Magistrate could be used and were believed to be true the offence charged was established against his client. His main contention was that when the prosecution declares a witness to be hostile and cross-examines such a witness as such, the prosecution cannot use the statement of such a witness and base a conviction on the testimony of that or similar witnesses. He referred us to a number of authorities where it has been held that when a witness makes two inconsistent statements that witness's testimony is not entitled to much weight, if any, at all. A view had prevailed in the Calcutta Court that in the circumstances where a witness makes a statement at one stage of the proceedings and completely resiles from that statement at a later stage that witness's statement should be ignored unless there was independent corroboration. The proposition of law then is this that a statement of a witness made before the Committing Magistrate

duly transferred to the Sessions record under S. 288 is substantive evidence for all purposes but as a matter of caution requires corroboration. As an abstract proposition this may in large number of cases be accepted as true but corroboration can be found in the circumstances surrounding a case and it has been consistently held by this Court that corroboration as a matter of law is not required. Reference in this connexion may be made to two recent Division Bench decisions of this Court to one of which I was a party. In 17 Lah. 419¹ Sir Douglas Young C. J. delivering the judgment of the Division Bench observed as follows :

[4] "There is nothing in the section of the Act itself to show that there need be corroboration of evidence so recorded. In our opinion evidence recorded in this manner in the Sessions Court is precisely the same as any other evidence. It has, like other evidence, to be examined with care. It is to be considered together with all the other surrounding circumstances. The learned Judge or Jury, as the case may be, must make up their minds whether the evidence is to be believed or not, and if it is believed, what value has to be placed upon it. No general law can, therefore, be laid down as to this. Evidence must be judged—as all evidence must be—according to the facts of each particular case. It is clear, however, in our opinion, that there is no difference in law between evidence of this sort and any other evidence."

[5] It is true that in this case there was some corroboration, but, as the learned Chief Justice observed, the point of law was raised and decided by them as such without reference to the corroborative evidence. In A.I.R. 1942 Lah. 215² I observed as follows :

[6] "Once a statement has been transferred, then, as I have stated already, the statement is evidence for all purposes without limitation. The use and value of such statements was considered exhaustively by Plowden J. in 51 P. R. Cr. 1887.³ When there are two statements of a witness on the record which are contradictory of each other, it is a matter for the Judge deciding the case to make up his mind which of these statements he will act upon because either is substantive evidence."

[7] Then I proceeded to quote a passage from the judgment of Plowden J. referred to already, where the rule is laid down that the credit to be given to the statements of a witness is not a matter regulated by rules of procedure. It appears to me that when a Judge has before him evidence which is substantive evidence without limitation the only test that has to be applied is the test laid down by S. 3, Evidence Act. The fact

1. (36) 23 A.I.R. 1936 Lah. 357 : 17 Lah. 419 : 162 I. C. 379, Narinjan Singh v. Emperor.

2. (42) 29 A.I.R. 1942 Lah. 215 : I.L.R. (1943) Lah. 397 : 202 I. C. 340, Mahomed Sarwar v. Emperor.

3. (87) 51 P. R. Cr. 1887, Umar v. Empress.

that a witness has resiled from his earlier statement is a fact to be taken into consideration in giving value to the statement that a Judge eventually relies upon. If with that circumstance in mind the Judge still thinks that the earlier statement is true then it is his duty to act upon it whether that statement is corroborated by independent evidence or not. In 51 P. R. Cr. 1887³ Plowden J. had occasion to deal with this question and this judgment has often been quoted as a leading judgment on the subject. Learned counsel for the appellant before us contends that there are observations in this judgment which lead one to the conclusion that corroboration is required as a matter of law. It appears to me that this is not a correct interpretation of that judgment. Reference was made by Plowden J. to a decision by Phear J. in 12 Beng. L. R. (App.) 15⁴ in which certain observations were made to the effect that the earlier depositions should not be transferred in their entirety to the Sessions record and treated as evidence. Plowden J., observed as follows :

[8] "But I am wholly unable to find anything in this section which prescribes the value or weight to be attached to the evidence thus admitted. Once admitted as it seems to me, the power given by this section in respect of the evidence is exhausted : the discretion of the Judge extending only to the question whether the former evidence is to be treated as evidence in the case. Once admitted it is on the same footing with all other evidence in the case, that is to say, it is to be considered by the jury, or by the assessors and the Judge, according to the nature of the trial, as part of the material upon which the verdict or the finding is to be given. It seems to me that the value of the previous evidence is a matter entirely beyond the scope of the section, as it is also of the Evidence Act. Its value is a question in the particular case for the jury or for the assessors, subject to the directions of the Judge in summing up, or for the Judge in cases where he is a Judge of fact. The section enables certain evidence which is not evidence in the case to be treated, in the Judge's discretion, as evidence in the case, and that is all. Whether any portion or the whole of the evidence thus admitted is entitled to credit, and if so to such a degree that a conviction may be based upon it wholly or in part, are very important questions for the jury, or assessors, or for the Judge as the case may be, but they are in no way affected by this section. * * *

I am unable to concur in all the views expressed on S. 288 by the learned Judges who decided the Calcutta case. In that case, as I understand the facts to be there stated, the sole evidence against the accused was that of witnesses who withdrew before the Sessions Judge at the trial the statements made by them before the committing Magistrate. I can concur in the view that when a Sessions Judge has convicted solely upon the evi-

dence of witnesses whom he regards as perjured, the conviction should be set aside as unsustainable."

[9] It is this last sentence just quoted that is relied upon by learned counsel for the defence before us in support of the proposition that corroboration from an outside source is necessary before a conviction can be based upon evidence admitted under S. 288, Criminal P. C. But the learned Judge goes on to explain what he means in the following words :

[10] "But my concurrence is based upon the ground that presumably such evidence cannot safely be acted upon, and not upon anything contained in S. 288, or any other rule of evidence or procedure. For the credit to be given to the statements, made or proved in accordance with law at a trial, of a particular witness, or of several witnesses, is a matter not regulated by rules of evidence or of procedure, but by the working of the reasoning faculty of each individual person who brings his mind to bear upon these statements for the purpose of determining whether he does or does not believe the facts stated with sufficient certainty to regard them as proved. The exercise of individual judgment in a particular case upon the evidence given in that case is not governed by rules of evidence or procedure, but is guided by experience, by observation of the demeanour of witnesses, by the observations of the Judge in his summing up (in a trial by jury or with assessors) and by other considerations not regulated by Acts of the Legislature."

[11] Now let us see what is the position in the present case. Mammi is the first cousin of the appellant. His sister was married to the appellant and he himself had married the appellant's sister. There is not the slightest background of enmity in this case between Mammi and Shamira, or, indeed, between any of the prosecution witnesses and Shamira. There is evidence which I see no reason for discarding and that is the evidence of Mammi himself that the character of both these women was believed to be doubtful. It is everybody's case that the murder was committed early in the morning. *Sehrgi* time would be somewhere soon after 4 A. M. and, therefore, the murder was committed at about 4 A. M., if not later. There is no doubt that the first information report was lodged by Mammi at 7 A. M. at the *thana* six miles away. In this report, to the correctness of which he has testified in Court, Mammi clearly said that he saw Shamira committing a murder in his presence and confessing his guilt to a number of persons who came on the outcries being raised. At this stage it is impossible to believe that the police could have tutored him into making a false statement. There is no suggestion of any kind made in this case that any person other than the appel-

4. ('74) 12 Beng. L. R. (App.) 15, Queen v. Amanullah.

lant had the slightest motive for inducing the witnesses to make false statements. To my mind it is certain that what is stated in the first information report has been stated correctly, because there was not the slightest reason for Mammi to have falsely implicated his cousin and brother-in-law on a charge of murder said to have been committed almost immediately before the report was made. The next stage in the proceedings is this that the very next day, i. e., on 26th Mammi made a statement to the Committing Magistrate in which again he clearly implicated Shamira as the murderer. When he came to the Court of Session, however, he at first tried to resile and stated that the earlier statement was the result of police pressure. To the Committing Magistrate no such statement was made and though a large number of witnesses appeared before the Committing Magistrate and supported the case for the prosecution fully, not one of them made any complaint to the Committing Magistrate that they had been forced or beaten by the police to make false statements implicating an innocent man. These circumstances, in my opinion, are sufficient for holding that it is the earlier statements which must be held to be true and that the later statements were made with the object of saving the appellant from the consequences of his crime and that they were made deliberately falsely.

[12 & 13] Apart from this, however, so far as Mammi is concerned, his statement at the trial when cross-examined by the Public Prosecutor is that he did as a matter of fact witness the murder of his wife and that the statement made by him in the first information report was correct. In my opinion the evidence in this case satisfies the test laid down by S. 3, Evidence Act. Learned counsel for the defence wanted us to apply an artificial rule of construction to such evidence. Such a mechanical rule would be that if a witness makes a statement at one stage and varies it at another the statement of this witness should be treated as if it was never made and so ignored from consideration. I am unable to accept this view. All that can be said is that because a statement has been varied or even resiled from the earlier statements, if substantive evidence, should be treated with extreme caution. Learned counsel referred to two recent Division Bench decisions of this Court, one of which is A.I.R. 1944 Lah. 377.⁵ But all that was held

in this case was that such evidence should be treated with caution. The next case was 41 P. L. R. 862,⁶ the head-note of which case reads as follows :

[14] "Where the prosecution witnesses have without exception resiled from their statements made before the Committing Magistrate they cannot be depended upon and in the absence of any other independent evidence, direct or circumstantial, on the record no conviction can be based on their statements."

[15] It is difficult to accept this proposition as laying down an abstract rule of law. What the learned Judges in the body of the judgment, however, held was that in the case before them there were actually three versions on the record ; one given in the first information report, the other put forward by certain prosecution witnesses and the third put forward by some defence witnesses. The learned Judges held "that on the facts stated it is difficult to hold that the case has been proved against the appellant beyond any reasonable doubt." This appears to me to be the true basis of the decision and the head-note, therefore, goes further than what was decided by the judgment. It is needless to multiply authorities on a point which appears to me to be conclusively settled. Reference, however, may be made to a decision of the Madras Court, 47 Mad. 232,⁷ where a similar question was raised and Wallace J. observed as follows :

[16] "The broad principle to be observed clearly is that where witnesses are so careless of the truth as to abandon readily on oath what they have previously sworn on oath, their statements on any point should not be accepted without great caution and sound judicial reason for accepting as true anything they have said. Sometimes this principle has been interpreted in particular cases to mean that sound judicial reasons are absent unless there is independent corroboration on material particulars: see 27 Cal. 295,⁸ 21 All. 111⁹ and 22 All. 445.¹⁰ That that is a rule of practice and not a rule of law may be readily seen by taking the extreme case of a conviction based on the uncorroborated evidence of an accomplice, which conviction is not bad in law. An automatic test for the credibility of witnesses is not one that can be stated or ought to be stated in statutory terms. The test cannot be mechanical but emerges for each case from the circumstances and probabilities of that case and is the net result of the effect of these on the mind of the Judge trying the case. In cases where witnesses have retracted in the Sessions Court their statements before the committing Court, the proper test is, are there reasonable grounds, grounds sufficient to satisfy a judicial mind, for holding that the former

6. ('39) 41 P.L.R. 862, Fazal v. Emperor.

7. ('24) 11 A.I.R. 1924 Mad. 379 : 47 Mad. 232 : 81 I. C. 203, Somadu Bachula Peda v. Emperor.

8. (1900) 27 Cal. 295, Queen-Empress v. Jadub Das.

9. ('99) 21 All. 111, Queen-Empress v. Jeochi.

10. (1900) 22 All. 445, Queen-Empress v. Nirmal Das.

5. ('44) 31 A.I.R. 1944 Lah. 377, Saudagar Singh v. Emperor.

statements are false and the latter are true?" Such grounds might be corroboration by other witnesses but need not necessarily be so. Each case must rest on its own evidence."

[17] In 53 Cal. 181¹¹ it has been pointed out that the words "for all purposes" were added to S. 288, by the amending Act of 1923, to remove the limitation to the value of the evidence, admitted under the section and, therefore, 12 Beng. L.R. App. 15⁴ would seem to be no longer good law. In this Calcutta case, 3 Pat. 781¹² (the case strongly relied upon by the defence before us) was referred to and disapproved on the ground that in that case the words "for all purposes" appearing in that section had been ignored. A similar point arose in 46 Bom. 97,¹³ where two witnesses implicated the accused before the Committing Magistrate but gave an entirely different version at the trial. The learned Judges held that there should be some reasoning on the record that the earlier statement made before the Committing Magistrate should be preferred to that made at the trial. They went on to say that the matter was one of prudence and not of law. The report, however, does not disclose whether there was other evidence in the case in support of the charge. Having regard to the state of the authorities it appears to me to be clear that as a matter of law no corroboration of any kind is required if the Judge is satisfied that the earlier statement is true. In the present case, I have no doubt in my mind that the statement made by Mammi in the first information report and at the committal stage was a correct version of the affair and that he later resiled from this statement as a result of pressure put upon him by his relations who are also the relations of the appellant. A similar view, I think, can be taken of the statements of the other witnesses who stated before the Committing Magistrate that they came on the scene of the occurrence immediately after the noise was raised and to them the appellant confessed his guilt. Apart from this there is the statement of Mammi made at the trial which implicates the appellant though in a hesitating manner. I myself cannot see any alternative but to hold true the case for the prosecution as disclosed in the earlier stages and I refuse, therefore, to apply any mechanical test. After consider-

ing all this evidence I have no doubt left in my mind that the earlier statements are true and whether they are corroborated or not, once I believe them to be true it is my judicial duty to act upon this belief when there is no statutory rule which prohibits my acting upon these statements when not corroborated.

[18] In this view of the matter I consider that the appellant has been proved to have inflicted injuries both on his wife and on his sister. As I have said already his intention must have been to cause death in each case. He injured two women who were wholly unable to defend themselves against the assault on them. The murder was preconceived and deliberate. I consider that the proper penalty in such a case is one of death and I would accordingly reject this appeal and confirm the sentence of death.

[19] **Bhandari J.** — I find myself in complete agreement with what has been said by my learned brother and will add only a few words of my own as we are differing from the view which has been entertained in Calcutta on a matter of some importance. Ordinarily, an inconsistent statement made before a Committing Magistrate is admissible only for the purpose of corroborating or contradicting the witness and cannot be received as evidence of any fact touching the issue to be tried. Section 288, Criminal P. C., constitutes a notable departure from the general rule, inasmuch as it provides that when a person has been committed for trial the deposition of any person taken before the Committing Magistrate may, in certain circumstances, be read as evidence at the trial of that person. This section enables the earlier deposition to be treated as substantive evidence in the case and not merely as evidence useful for the purpose of impeaching the credit of the witness. The marginal note makes it plain that the section deals with the admissibility of the evidence and not with the weight to be attached thereto. The general rule of law concerning the admissibility of evidence and the particular conclusion which a Judge or a Jury may draw from such evidence are two entirely different things. A Court may admit a particular type of evidence in proof of a particular fact but it may discover that that evidence is wholly inadequate to prove the point. If, for example, a lunatic is tendered as a witness, it is for the Judge to decide whether he is of competent understanding to give evidence and is aware of the nature

11. ('26) 13 A. I. R. 1926 Cal. 235 : 53 Cal. 181 : 90 I. C. 537, Abdul Gani v. Emperor.

12. ('25) 12 A.I.R. 1925 Pat. 51 : 3 Pat. 781 : 84 I. C. 334, Emperor v. Jehal Teli.

13. ('22) 9 A. I. R. 1922 Bom. 108 : 46 Bom. 97 : 63 I. C. 332, Emperor v. Maruti.

and obligation of the oath which he has taken. The weight that may be attached to the evidence so given is an entirely different thing, for the credibility of a witness depends on various factors such as his knowledge of the facts to which he deposes, his disinterestedness, his integrity, his veracity and his being bound to speak the truth by such an oath as he deems obligatory.

[20] If the evidence given by a witness before a Committing Magistrate is duly transferred to the Sessions file under S. 288, Criminal P. C., the question arises whether a person who is capable of uttering a deliberate falsehood on one occasion can be relied upon on another occasion. This, however, is a question which may arise in the case of any witness, whether his statement has or has not been transferred under the exceptional powers conferred by S. 288, Criminal P. C. The maxim "He who speaks falsely on one point will speak falsely upon all" is, in strictness, concerned not with the admissibility but with the weight of evidence. At one time it was thought that a person who gives false evidence as to one particular cannot be credited as to any, and that his evidence must of necessity be rejected *in toto*. The maxim on which this notion was based is not true to human nature, for it is impossible to assert that a person who tells a single lie is necessarily lying throughout his testimony. This point was considered in three reported cases from America, in which the Judges expressed the following views: 1855, Pearson J., in 2 Jones L. 269¹⁴:

[21] "When the credit of a witness is to be passed upon, each juror is called upon to say whether he believed him or not. This belief is personal, individual, and depends upon an infinite variety of circumstances. Any attempt to regulate or control it by a fixed rule is impracticable, worse than useless, inconsistent and repugnant to the nature of a trial by jury."

[22] 1856, Appleton J., in 41 Mc. 411¹⁵:

[23] "The truth or falsehood of testimony depends upon the motives, or the balance of motives, acting upon the witness at the time of its utterance. The motives which influence the human mind are as various as the feelings and desires of man There is no motive the action of which upon testimony is uniform. The same motive may lead to truth or to falsehood The witness may be exposed to the action of a different class of motives as to the several facts to which his testimony may relate. It is obvious therefore that, of the testimony of the same witness, part may be true and reliable and part false and mendacious. A rule of law which requires a jury to infer from one false assertion that all facts uttered by the witness are false statements is manifestly erroneous It is the determination of the trust-

worthiness or untrustworthiness of testimony in advance of its utterance, and in utter and hopeless ignorance of all facts essential to a correct decision."

[24] 1867, Campbell J., in 15 Mich. 412¹⁶:

[25] "There has never been any positive rule of law which excluded evidence from consideration entirely, on account of the wilful falsehood of a witness as to some portions of his testimony. Such disregard of his oath is enough to justify the belief that the witness is capable of any amount of falsification, and to make it no more than prudent to regard all that he says with strong suspicion, and to place no reliance on his mere statements. But when testimony is once before the jury, the weight and credibility of every portion of it is for them, and not for the Court to determine."

[26] It has been said that corroboration is the proof of some fact which leads to the supposition that a witness has sworn truly upon the matter as to which he has given evidence. If the Court is prepared to believe that, having regard to all the circumstances of the case, the statement made by a witness before the Committing Magistrate represents a correct statement of the facts to which he has deposed, it is obvious that corroboration would be a surplusage. The proposition that it is an absolute rule of law that the Court cannot or should not act on the uncorroborated testimony of a witness whose statement has been transferred under S. 288, Criminal P. C., is in my opinion wholly misconceived. The law does not impose fetters on the discretion of the Court and it does not indicate the grooves in which the discretion should run. The maximum limit to which I should be prepared to go is that the uncorroborated testimony of a witness who has made utterly contradictory statements on two or more different occasions should be examined with care. If, in the result, it convinces the Court that the statement made by him on the previous occasion was correct, the Court should accept the statement even though it is entirely lacking in corroboration. The classical judgment which was delivered by Sir Meredyth Plowden in the eighties of the last century still holds the field and has been consistently followed by this Court ever since the year 1887. I would respectfully endorse the views that were expressed by that learned Judge. I concur in the order proposed.

G.M./D.H.

Sentence confirmed.

16. (1867) 15 Mich. 412, Knowles v. People.

14. (1855) 2 Jones L. 269, State v. Williams.

15. (1856) 41 Mc. 411, Parsons v. Huff.

[Case No. 71.]

A. I. R. (33) 1946 Lahore 387DIN MOHAMMAD AND MOHAMMAD
SHARIF JJ.*Ganga Sagar — Plaintiff-Appellant*
v.*Inam Ilahi — Defendant-Respondent.*

First Appeal No. 58 of 1940, Decided on 31st January 1946, from decree of Commercial Sub-Judge, 1st Class, Delhi, D/- 1st December 1939.

(a) Civil P. C. (1908), S. 11 — Plea that certain issue was *res judicata* by reason of appellate judgment in previous suit raised for first time in appeal — Appellate judgment in previous suit delivered after judgment of trial Court in subsequent suit — Plea raised on material already existing — Plea can be allowed to be taken even at appellate stage.

A suit based on certain *hundis* alleged to have been drawn by A on himself and accepted by himself was dismissed on the ground that the *hundis* were not drawn or accepted by A. In appeal from this decision the plaintiff for the first time pleaded that the issue whether the *hundis* were drawn and accepted by A was *res judicata* by reason of the judgment of the High Court in a previous suit. The said judgment of the High Court was delivered after the judgment of the trial Court in the subsequent suit. Moreover, no further facts were to be brought on record and the plea was sought to be raised on the material already existing there. The defendant contended that the plea of *res judicata* could not be raised in the appellate Court :

Held that the plea was sought to be raised on the material already existing and the judgment of the High Court which was pleaded as a bar was delivered after the judgment of the trial Court in subsequent suit. Consequently the plea could be raised even in appeal : ('36) 23 A. I. R. 1936 P. C. 258, *Disting.* [P 388 C 2; P 389 C 1]

C. P. C. —

('44) Chitaley, O. 41, R. 1, Note 12.

(b) Civil P. C. (1908), S. 11 — Suit on one of ten *hundis* said to have drawn on D under his authority and later on accepted by him — Finding regarding drawing of *hundi* and its acceptance held operated *res judicata* in subsequent suit on remaining nine *hundis*.

A suit was brought on one of the ten *hundis* said to have been written by M under the authority of D and drawn on D himself and later on accepted by D. The suit was decreed and the appellate Court agreeing with the finding of the trial Court held that the *hundi* though written by M on behalf of D, was drawn at the instance of D and it was accepted by D and that the endorsement at the back of the *hundi* was in D's handwriting. Subsequently another suit was brought on the remaining nine *hundis* against D :

Held that the findings in the previous suit as regards the drawing of the *hundis* by M with the permission and under the authority of D and their subsequent acceptance by D were *res judicata* in the subsequent suit on the remaining nine *hundis*: *Case law referred.* [P 390 C 2; P 391 C 1]

Held further that even if this were not so, the previous judgments would necessarily be valuable pieces of evidence and could not, in the circum-

stances, be ignored in deciding the subsequent suit. [P 391 C 1]

C. P. C. —

('44) Chitaley, S. 11, Note 72.

(c) Appeal—Trial Court going wrong in appreciation of evidence of witnesses—Appellate Court may disturb trial Court's finding.

It is true that an appellate Court should not ordinarily disturb the opinion of the trial Judge as regards those witnesses whose evidence he has recorded himself, but this rule is not so inflexible as to deprive an appellate Court of its legitimate powers even if it feels satisfied that the trial Judge has evidently gone wrong in the matter : ('34) 21 A. I. R. 1934 P. C. 12, *Rel. on.* [P 391 C 1]

(d) Negotiable instruments—Hundi—Agent authorised to draw *hundi* in name of principal need not indicate that he is drawing it as agent.

An agent, who is authorised to draw a *hundi* in the name of his principal and to sign his name, is not required to indicate on the face of the *hundi* that he is drawing it as an agent or with the authority of the principal. In not doing so, therefore, the agent is not guilty of any *mala fides*. [P 391 C 2]

Shamair Chand, Yashpal Gandhi and D. K. Mahajan — for Appellant.

M. F. Rahman and Indar Singh Karwal —
for Respondent.

Din Mohammad J. — This appeal has arisen out of a suit instituted by R. B. Seth Ganga Sagar against Sheikh Inam Ilahi Allahwala for recovery of Rs. 48,231. The claim was based on nine out of the ten *hundis* said to have been drawn by the defendant on himself on 17th November 1936, and later accepted by him on the following day, the payee being the firm Mohammad Ishaq Allahwala. This firm, it may be observed, was owned by two brothers Mohammad Shafi and Mohammad Rafi, and while the defendant was married to the daughter of the former, Mohammad Saeed who had actually written the *hundis* was the son of the latter. The defendant denied all the material allegations made against him in the plaint, and contended, *inter alia*, that the *hundis* in dispute were neither drawn by him or under his authority nor had he signed his assent upon them at any time later. In the replication filed by the plaintiff it was explained that the *hundis* in suit had actually been written and signed by Mohammad Saeed with the permission and under the authority of the defendant and that he had accepted them in due course when called upon to do so. On the pleadings of the parties the following six issues were raised :

[2] 1. Whether the nine *hundis* in suit were drawn or accepted by the defendant?

2. Did Mohammad Ishaq Allahwala transfer the *hundis* to the plaintiff ?

3. Can the defendant plead want of consideration? If so, did he receive consideration?

4. Can the defendant plead whether the hundis were not duly presented for payment or acceptance? If so, what is its effect?

5. Is the suit collusive?

6. To what amount is the plaintiff entitled?

[3] Issue 2 was decided in favour of the plaintiff and so were issues 3, 4 and 5. On issue 1, however, the trial Judge came to the conclusion that Mohammad Saeed had no authority whatever to draw the *hundis* in suit on behalf of the defendant and consequently the signatures purporting to be those of the defendant were forged and inoperative. He further found that even the so-called acceptance was not in the handwriting of the defendant. The result was that the plaintiff's suit was dismissed but the parties were left to bear their own costs on the ground of justice and equity as remarked by the Subordinate Judge. From this order the unsuccessful plaintiff has appealed. The only question that arises for decision in this case is whether the *hundis* in suit were drawn on himself with the permission and under the authority of the defendant and were later accepted by him. In this connection it would be useful to state here that on one of the *hundis* that matured on the sixty first day of the execution thereof a suit was instituted by the plaintiff against the defendant on 20th January 1937, in the Court of the Senior Subordinate Judge, Delhi. That suit was also resisted by the present defendant on exactly similar grounds, but was decreed by the Senior Subordinate Judge. An appeal from that order was lodged in this Court and was heard by Sir Douglas Young, C. J. and Tek Chand J. on 28th and 29th November 1939, and decided on 18th December 1939. In the course of their judgment the learned Judges *inter alia* observed :

[4] "Taking the case as a whole, we agree with the learned Subordinate Judge in holding it proved that the *Hundi* in question though written by Mohammad Saeed on behalf of the appellant was drawn at his instance and that it was accepted by the appellant himself and that the endorsement (C) at the back is in his own handwriting. The appellant is, therefore, liable to pay to the plaintiff-respondent the amount claimed and the suit has been rightly decreed against him."

[5] It may further be observed that in support of his allegation the plaintiff in that case too had examined the same witnesses as have appeared in the present case, namely Mohammad Saeed, Motiram, Chandu Lal, Jamna Das and Kidar Nath and in respect of these witnesses the learned Judges remarked ;

[6] "The evidence of these persons has been accepted by the Subordinate Judge as true and, after examining it, we agree with him."

[7] Armed with these findings, counsel for the appellant at the outset contended that the sole question involved in the present appeal was *res judicata* and the appellant was consequently entitled to succeed without any further argument. He urged in this connection that although the plaintiff had raised this matter in para. 10 of the plaint, the Subordinate Judge failed to frame any issue thereon presumably influenced by the statement made by the defendant's counsel on 22nd July 1938, to the effect that that suit had nothing to do with the present suit inasmuch as the *hundis* now sued upon were different from the one on which the previous claim was based. It was stressed that in the first instance the plea of *res judicata* should have been allowed to be raised by the Subordinate Judge and that he should have waited for the decision of the High Court in the previous appeal knowing that it had been heard before he delivered his own judgment on 1st December. Secondly, at any rate, the judgment of the appellate Court not having been available in the Court of first instance, the plaintiff was at liberty to raise the plea on appeal, especially as no further facts were to be brought on the record in order to substantiate it. On this matter, counsel cited A.I.R. 1941 Mad. 815,¹ A.I.R. 1933 Oudh 104² and A. I. R. 1939 Lah. 556.³ On behalf of the respondent, on the other hand, it was equally strenuously urged that the plea should not be allowed to be raised as it could and should have been raised in the Court of the trial Judge. Reliance in this connection was placed upon A. I. R. 1936 P. C. 258;⁴ but, in my view, the judgment is not in point. There, their Lordships of the Privy Council approved of the action taken by the High Court in declining to allow the appellant to raise the question of *res judicata* on the sole ground that, if allowed it would be necessary for the appellant to identify the subjects in dispute in the case before them with the subjects which were involved in the previous case. Here, however, no further facts are to be brought on the record and the plea is sought to be raised on the mate-

1. ('41) 28 A.I.R. 1941 Mad. 815 : 197 I. C. 448, Rangayya v. Ramayya.

2. ('33) 20 A.I.R. 1933 Oudh 104 : 143 I. C. 338, Durabali Pande v. Shiva Charan.

3. ('39) 26 A.I.R. 1939 Lah. 556 : 185 I. C. 609, Baldeo Singh v. Sher Singh.

4. ('36) 23 A.I.R. 1936 P. C. 258 : 164 I. C. 17 (P C), Gagadish Chandra Deo v. Gour Hari.

rial already existing there. Moreover, the judgment of the High Court which is pleaded as a bar was delivered more than a fortnight after the decision of the trial Judge and consequently this is the only stage where the plea can be properly raised. I am inclined to think, therefore, that the appellant should be allowed to raise this plea even at this stage.

[8] On the question of *res judicata* counsel for the appellant argued that although the *hundis* sued upon in the present case were not the subject-matter of the previous suit, yet it was obvious that these *hundis* along with the one sued upon before were all drawn and accepted at one and the same time and place and were sought to be proved by the same evidence. The questions, therefore, whether the *hundis* had or had not been drawn under the authority of the defendant and whether he had or had not accepted them later could not be re-agitated at all. In support of this contention, besides the judicial authorities which will be discussed later, he drew our attention to the following passage occurring in Hukam Chand's Treatise on the Law of *Res judicata* at page 520:

[9] Mr. Wells says: It is on the principle that the cause of action need not to be the same, although the issue must be the same, that the rule rests, namely, that a suit on one promissory note or bond will be conclusive upon another executed under the same circumstances, if also sued on. In *Bouchand v. Dias*, Branson, C. J., said, referring to number of cases, that in them, the cause of action in the second suit was different from the cause of action in the first, but the former determinations were held to be conclusive because the same question was determined in the first suit on which the second depended. Mr. Black says: "There are sometimes cases, in which a party proceeding upon a certain theory as to the legal effect of a given transaction or state of facts finds himself unable to substantiate his view of the case, but afterwards, without any change in the facts, but acting upon a different theory, renews the litigation in a different form. Here we must apply the test generally agreed upon as the proper means of ascertaining the identity of the cause of action, viz., whether the same evidence would support both suits. If not, there is no bar arising from the former judgment."

[10] So far as the decided cases of this country are concerned, reference was made to 4 ALL. 55,⁵ A.I.R. 1928 Nag. 112,⁶ A. I. R. 1938 Nag. 401,⁷ 57 Cal. 258⁸ at p. 267, A. I. R.

1933 Cal. 879,⁹ 5 I. C. 278¹⁰ and A. I. R. 1933 Oudh. 535.¹¹ In all these judgments it was observed that even if the subject matter and cause of action were different, if the matter in issue was the same or both the previous and the subsequent suits had arisen out of the same title, a decision arrived at in the previous suit was *res judicata* in a subsequent suit. Again in A. I. R. in 1926 Cal. 1022¹² and A. I. R. 1934 Cal. 179¹³ it was remarked that even if a particular matter was not included in a formal issue, if it was directly and substantially in issue between the parties, and there was a decision thereon, it would operate as *res judicata*. Counsel further urged that it was now well established that S. 11, Civil P. C., was not exhaustive and consequently a Court in order to avoid conflicting judgments on the same question could travel beyond the limits set by that section. In support of this proposition reliance was placed on three judgments of their Lordships of the Privy Council reported in 43 Cal. 694,¹⁴ 45 Mad. 320¹⁵ and A. I. R. 1930 P. C. 22¹⁶ as well as on A. I. R. 1931 Bom. 507,¹⁷ A. I. R. 1934 Cal. 430¹⁸ and 15 Lah. 869.¹⁹ In 43 Cal. 694¹⁴ their Lordships of the Privy Council observed:

[11] "And so the application of the rule by the Courts in India should be influenced by no technical consideration of form but by matter of substance within the limits allowed by law."

[12] In 45 Mad. 320,¹⁵ their Lordships founded the plea of *res judicata* on a previous decree although it had not been made "in a former suit" within the meaning of S. 11, Civil P. C. In A. I. R. 1930 P. C. 22,¹⁶ the rule was applied although the pre-

9. ('33) 20 A. I. R. 1933 Cal. 879 : 147 I. C. 718, Debendra Kumar v. Pramada Kanta.

10. ('10) 5 I. C. 278 (All.), Ram Krishna v. Shiam Chand.

11. ('33) 20 A. I. R. 1933 Oudh 535 : 9 Luck. 237 : 147 I. C. 540, Putto Lal v. Raghubir Prasad.

12. ('26) 13 A. I. R. 1926 Cal. 1022 : 97 I. C. 73, Rohini Nandan v. Jadu Nandan.

13. ('34) 21 A. I. R. 1934 Cal. 179 : 150 I. C. 214, Mahomed Ali Haidar Khan v. Upendra Nath.

14. ('16) 3 A. I. R. 1916 P. C. 78 : 43 Cal. 694 : 43 I. A. 91 : 33 I. C. 914 (P. C.), Sheoparsad Singh v. Ramnandan Prasad.

15. ('22) 9 A. I. R. 1922 P. C. 80 : 45 Mad. 320 : 49 I. A. 129 : 67 I. C. 408 (P. C.), T. B. Ramchandra Rao v. A. N. S. Ramchandra Rao.

16. ('30) 17 A. I. R. 1930 P. C. 22 : 57 I. A. 24 : 121 I. C. 200 (P. C.), Kalipada De v. Dwijapada Das.

17. ('31) 18 A. I. R. 1931 Bom. 507 : 134 I. C. 970, Mir Hassan Ali v. Sanli Begum.

18. ('34) 21 A. I. R. 1934 Cal. 430 : 61 Cal. 1 : 151 I. C. 743, Abdul Sobhan v. Benimadhav.

19. ('35) 22 A. I. R. 1935 Lah. 200 : 15 Lah. 869 : 155 I. C. 286, Prabhu Dayal v. Devdat Ram.

5. ('82) 4 All. 55, Pahlwan Singh v. Risal Singh.

6. ('28) 15 A. I. R. 1928 Nag. 112 : 106 I. C. 861, Paiku v. Mt. Kamalji.

7. ('38) 25 A. I. R. 1938 Nag. 401 : I. L. R. (1938) Nag. 496 : 180 I. C. 922, Mt. Sitabai v. Hari.

8. ('30) 17 A. I. R. 1930 Cal. 47 : 57 Cal. 258 : 124 I. C. 161, Abdul Gani v. Nabendra Kishore.

vious decision on the question of relationship of parties had been given not in a regular suit but in probate proceedings only. In A. I. R. 1931 Bom. 507,¹⁷ decided by Beaumont C. J., and Baker, J., and A. I. R. 1934 Cal. 430,¹⁸ decided by Ghose Ag. C. J., and Costello J., S. 11 was declared not to be exhaustive of the circumstances in which an issue was *res judicata*, and it was added that the plea still remained apart from the limited provisions of the Code. In 15 Lah. 869,¹⁹ the principles underlying the rule of *res judicata* were held applicable to execution proceedings although S. 11 did not in terms apply to them. It was finally argued that even if the decision in the previous suit was not held to be *res judicata*, it would at least be a binding precedent or a valuable piece of evidence not liable to be ignored. Reference in this connection was made to A. I. R. 1939 Cal. 192,²⁰ 45 ALL. 515,²¹ 139 P. W. R. 1902,²² A. I. R. 1936 Oudh. 189,²³ I. L. R. (1937) 1 Cal. 400²⁴ at p. 404 and 173 I. C. 447.²⁵ Counsel for the respondent on the other hand urged that as the *hundis* sued upon in the present suit were different from the *hundi* sued upon in the former suit, any decision arrived at in the former suit could not be *res judicata* in the present suit. In support of this proposition reliance was placed on 7 ALL. 247,²⁶ 35 Mad. 216,²⁷ A. I. R. 1932 Bom. 3²⁸ and A. I. R. 1927 P. C. 102.²⁹ These judgments, however, proceed on their own facts and can be easily distinguished. In 7 ALL. 247,²⁶ it was held that the decision arrived at in a previous suit that two out of the four bonds executed at one and the same time had been satisfied could not be *res judicata* when a suit was later brought on the other two bonds. In 35 Mad. 216,²⁷ it was emphasized

20. ('39) 26 A. I. R. 1939 Cal. 192 : 182 I. C. 626, Sajidulla v. Habibullah.

21. ('23) 10 A.I.R. 1923 All. 613 : 45 All. 515: 76 I. C. 370, Kedar Nath v. Sheo Shankar.

22. ('09) 4 I. C. 997 : 139 P. W. R. 1909, Raghunath v. Ismail.

23. ('36) 23 A. I. R. 1936 Oudh 189 : 165 I. C. 132, Mt. Aziman v. Ibrahim Beg.

24. ('38) 25 A. I. R. 1938 Cal. 34 : I. L. R. (1937) 1 Cal. 400 : 173 I. C. 857, Bibhabati Debi v. Mahendra Chandra.

25. ('38) 173 I. C. 447 (P. C.), Giriwar Prasad Narayan Singh v. Rameshwar Lal.

26. ('85) 7 All. 247 (F. B.), Sheoraj Rai v. Kashi Nath.

27. ('12) 35 Mad. 216 : 10 I.C. 75, Bayya Naidu v. Paradesi Naidu.

28. ('32) 19 A. I. R. 1932 Bom. 3 : 136 I. C. 801, Shankar Yesu v. Khem Sawant.

29. ('27) 14 A.I.R. 1927 P. C. 102 : 8 Lah. 573 : 54 I. A. 178 : 101 I. C. 355 (P. C.), Dhanna Mal v. Moti Sagar.

at p. 220 that the rule appeared to be that where the decision on a question was essential to the relief granted or the decree passed, or where it formed the groundwork of the decision, then the matter must be deemed to have been directly and substantially in issue in the suit. The rule of *res judicata* was, however, not applied in that case as it was observed at p. 222 :

[13] "But it is to be noticed that though a *patta* when tendered to a tenant must be one he is bound to accept, the tender of a *patta* is not essential to entitle a landlord to recover rent. The parties may dispense with it. A decree for rent, therefore, does not necessarily involve the decision that a proper *patta* has been tendered."

[14] In A.I.R. 1932 Bom. 3,²⁸ the point at issue between the parties in the subsequent suit was held not to be before the Court at all in the prior suit and similarly A. I. R. 1927 P. C. 102²⁹ proceeded on different set of facts altogether. Counsel for the respondent further contended that the question of agency was not finally decided in the previous suit as regards the nine *hundis* in dispute, nor was it necessary for the purpose of deciding that suit to settle that matter inasmuch as the final decision proceeded on the ground that the defendant had accepted the *hundis*. I am not disposed to agree. As stated above, both questions were pressed by the defendant in both the Courts in the original suit and both were decided against him and it is well settled that in these circumstances both the findings would operate as *res judicata*. See 51 Cal. 631,³⁰ 38 Mad. 158,³¹ A.I.R. 1931 Lah. 335,³² A.I.R. 1932 Cal. 385.³³ Counsel for the respondent finally argued that neither under S.13 nor under Ss. 40, 41, 42, Evidence Act, the previous judgment could be admitted in this case. Here too he is on weak ground. The authorities relied upon by the appellant, even including a Privy Council judgment reported in 173 I. C. 447,²⁵ clearly favour the position maintained by him.

[15] I would, therefore, hold that the findings arrived at by the Senior Subordinate Judge in the previous suit, which were later confirmed by the High Court both as regards the drawing of the *hundis* by Mohammad Saeed with the permission and

30. ('24) 11 A.I.R. 1924 P. C. 144 : 51 Cal. 631 : 51 I. A. 293 : 80 I. C. 827 (P. C.), Midnapore Zamindari Co., Ltd. v. Naresh Narayan Roy.

31. ('15) 2 A.I.R. 1915 Mad. 864 : 38 Mad. 158 : 21 I. C. 258, Venkataraju v. Ramanamma.

32. ('31) 18 A.I.R. 1931 Lah. 335: 133 I. C. 641, Wadhava Singh v. Ladha Singh.

33. ('32) 19 A. I. R. 1932 Cal. 385 : 137 I.C. 696, Krishnachandra v. Surendra Nath.

under the authority of the defendant and the defendant subsequently accepting them, operate as *res judicata*. But even if this were not so, the previous judgments will necessarily be valuable pieces of evidence and cannot in any circumstances be ignored in deciding the present case. Quite independently, however, of the legal position explained above, I am of the opinion that the Subordinate Judge had grossly erred in rejecting the appellant's evidence in this case. It is true that an appellate Court should not ordinarily disturb the opinion of the trial Judge as regards those witnesses whose evidence he has recorded himself, but this rule is not so inflexible as to deprive an appellate Court of its legitimate powers even if it feels satisfied that the trial Judge has evidently gone wrong in the matter. If any authority is needed for this proposition, reference may be made to A. I. R. 1934 P.C. 12.³⁴ There it has been observed as follows:

[16] "The question, therefore, turns wholly on the credibility of the plaintiff's witnesses. In the first place, it is to be noted that the learned Subordinate Judge's rejection of the plaintiff's evidence is solely based on the evidence, oral and documentary, placed before him; he makes no comment on the demeanour of the witnesses or on their truthfulness apart from comments on the probabilities of the truth of the story actually told by them viewed in the light of the surrounding circumstances. It follows that an appellate Court is in as good a position to judge of the matter as the trial Court. In the second place, their Lordships agree with the High Court that the criticisms of the Subordinate Judge, when pushed to their logical conclusion, amount to the allegation of a widespread conspiracy on the part of the original plaintiff, Bala Kunwar, and her witnesses, and this was admitted by counsel for the present appellants. It is further to be observed, as also noted by the High Court, that none of the witnesses was asked any question as to any discreditable action on his part at any time of his life, nor was any suggestion made to any one of them that he was engaged in a conspiracy, nor was the initiator or the active mover of the conspiracy indicated, except in so far as the Judge himself points to the lady.

[17] In these circumstances their Lordships are of opinion that the learned Subordinate Judge was not entitled to attribute to the original plaintiff and her witnesses conspiracy and perjury, unless the story told by them, coupled with the surrounding circumstances, was of itself so unnatural and improbable that only one conclusion, *viz.*, conspiracy and perjury, was reasonably possible."

[18] These remarks apply *mutatis mutandis* to the present case. In this case too the Subordinate Judge has written a long dissertation on the probabilities of the case and has tried to establish some sort of conspiracy between the plaintiff and his

witnesses, but he has evidently based his conclusion not on facts but on mere surmises and conjectures. Taking the evidence of Mohammad Saeed first, who admittedly was a close relation of the defendant and had no animus whatever against him, the Subordinate Judge in spite of being aware of these facts rejected his evidence on the following grounds:

[19] (1) "The alleged implied authority given during the course of business must have been done so in the presence of Mohammad Rafi and Mohammad Shafi, proprietors of Mohammad Ishaq Allahwala, who have not been deliberately examined. It is significant further to remark that Mohammad Shafi endorsed the suit *hundis* on the same day of their execution and he would have been a material witness if any alleged authority was conferred upon Mohammad Saeed by the defendant. The omission to examine Mohammad Shafi and Mohammad Rafi strongly goes against the plaintiff."

[20] In my view, this criticism is on the face of it unsound. In the first place, the Subordinate Judge should have known that the appellant had never relied on any implied authority and that from the very start he had been insisting on express authority given by the defendant to Mohammad Saeed for the purpose of drawing the *hundis* in suit. Secondly, the plaintiff could not at all be blamed for not producing Mohammad Shafi and Mohammad Rafi as his witnesses inasmuch as, first, they were closely related to the defendant and could never be expected to depose against him and, secondly, it was not at all necessary for him to examine them seeing that Mohammad Saeed had supported him through and through. If the defendant knew that the position maintained by the plaintiff was incorrect, it was open to him to have examined these witnesses in order to give the lie to Mohammad Saeed. This circumstance, therefore, could not be utilized in discrediting Mohammad Saeed.

[21] (2) "No plausible or satisfactory explanation has been assigned as to why Mohammad Saeed did not clearly specify on the face of the bills that he was signing them as an agent of the defendant. This deliberate omission is a circumstance going very strongly against Mohammad Saeed and tends to show that he had a *mala fide* intention."

[22] This argument too is equally unconvincing. It is well known that an agent, who is authorised to draw a *hundi* in the name of his principal and to sign his name, is not required to indicate on the face of the *hundi* that he is drawing it as an agent or with the authority of the principal. In not doing so, therefore, Mohammad Saeed was not guilty of any *mala fides* and con-

34. (34) 21 A. I. R. 1934 P. C. 12 : 147 I. C. 326 (P. C.), Govind Prasad v. Bala Kumar.

sequently this circumstance too could not be used against him.

[23] (3) "Mohammad Saeed was admittedly not a proprietor of the firm Mohammad Ishaq Allahwala."

[24] This reasoning is not intelligible. It was not necessary that the defendant should confer this authority on the proprietors of the firm alone. He could authorize any person he liked to draw *hundis* on his behalf.

[25] (4) "There was no other course open for Mohammad Saeed but to profess implied authority, as the criminal liability for having committed a fraud and passing a forged document as a genuine one would have attached to him."

[26] Suffice it to say that, as remarked above, the defendant never relied on any implied authority. Further the defendant with a view to vindicating himself has not had the courage of launching any criminal proceedings so far against Mohammad Saeed in spite of an adverse decision in the previous suit and this rather tells heavily against him.

[27] (5) "Civil liability would also have been foisted on him as it is a settled rule of law that the principal cannot be bound if the agent had no authority to sign. Then the only remedy of the holder is against the agent in an action for damages for deceit."

[28] The Subordinate Judge in discussing the criminal or the civil liability of Mohammad Saeed has evidently ignored the obvious fact that in case any such proceedings had been started against Mohammad Saeed, he would have been supported by his own father Mahommad Rafi and his uncle Mohammad Shafi as against the solitary word of the defendant himself and this would most probably have been rejected as tainted and interested.

[29] (6) "Mohammad Saeed has freely admitted that the defendant was available in Delhi on 17th November and was able to sign the bills himself. No cogent reason has been assigned why the defendant did not sign the documents himself if he was ready to undertake the liability."

[30] It is not denied by the defendant himself that he had been accommodating the firm Mohammad Ishaq Allahwala in this manner before nor has it been disproved that Mohammad Saeed had drawn such *hundis* under the authority of the defendant. It was not strange, therefore, that the defendant authorised Mohammad Saeed to draw the *hundis* in suit on 17th November.

[31] (7) "Mohammad Saeed admittedly has not acted in any other transaction for or on behalf of the defendant,"

and

(8) "no other bill purporting to have been signed by Mohammad Saeed on behalf of the defendant

has been produced nor any creditor has been examined to say that Mohammad Saeed ever acted for the defendant or drew any *hundi* on his behalf."

[32] This is evidently wrong. In this connection it may be useful to refer to what was observed by a Bench of this Court while disposing of the appeal in the previous suit:

[33] "Mohammad Saeed has given evidence in the case and has supported the plaintiff's claim. He has stated that he drew the *hundi* on behalf of Inam Elahi and signed it for him, as he was asked by Inam Elahi to do so. Mohammad Saeed is a near relation of Inam Elahi and no reason has been shown as to why he should give false evidence against him. He has further deposed that *he had on other occasions written a number of hundis on behalf, and at the instance of Inam Elahi* and that several of these *hundis* had been duly discharged by Inam Elahi and had been returned to him by the endorsees. Inam Elahi admitted that he had a number of discharged *hundis* with him but he failed to produce any of them and he has not given any satisfactory explanation for their non-production."

[34] (9) "No portion of the money came to the defendant."

[35] (10) "There is nothing to indicate that the defendant had funds in his hands belonging to the firm Mohammad Ishaq Allahwala or was willing to give him credit as no pressing need for loan has been shown or existed."

[36] (11) "The aforesaid firm was on the verge of insolvency then and it failed on 15th December 1936."

[37] These arguments are also equally devoid of force. The defendant had as his own witness stated as follows:

[38] "I used to advance money to the firm Mohammad Ishaq Allahwala whenever it was required. I drew *hundis* on myself with my own hand and gave them to Mohammad Ishaq Allahwala so that they may endorse them in the market and borrow money. They used to utilise the money so borrowed and used to pay the *hundis* on due dates. . . . I am unable to tell the number of the *hundis* drawn or endorsed by me. I have been writing or endorsing *hundis* for the last 3 or 4 years for Mohommad Ishaq Allahwala."

[39] In the first place it was not necessary that the defendant should share the proceeds of these *hundis* with the firm Mohammad Ishaq Allahwala. Further, it is hard to tell what was working in the mind of the defendant at the time when these *hundis* were drawn. The suggestion made by the appellant in this connection is not altogether improbable. He has argued that inasmuch as the firm was on the verge of insolvency, the help of the defendant, who was solvent, was requisitioned for the purpose of raising this loan and the *hundis* were intentionally drawn in the form in which they now appear so that even the defendant may if possible escape liability on the argument that he is now advancing.

It is significant that even on 15th December 1936, when the firm failed, the plaintiff had brought to the notice of the defendant that he was holding ten *hundis* of the value of Rs. 50,000 drawn by Mohammad Saeed on his behalf on 17th November 1936, and later accepted by the defendant himself on the following day. Further, it cannot be denied that on 13th January 1937, the defendant instituted a suit against several persons, including the plaintiff, for a declaration that the *hundis* in their possession purporting to bear his signatures "were void and liable to be annulled." This evidently goes a long way to support the plaintiff's case. A forger, as the defendant now characterizes the plaintiff to be, would never have proclaimed his own offence in the manner suggested by the defendant.

[40] The Subordinate Judge has laid much stress on the fact that in the account books of Mohammad Ishaq Allahwala the word "likhi" had been used in connection with these *hundis* which means that the *hundis* were drawn by the firm itself. But he has altogether ignored the fact that the *hundis* were never represented to be drawn by the firm on itself and that all that the firm was said to have done was to endorse them in favour of the plaintiff. Moreover, the plaintiff cannot be harmed in any manner by anything written by the firm Mohammad Ishaq Allahwala in their own books. In the same manner, the Subordinate Judge has improperly rejected the evidence of all those witnesses who deposed to the defendant having accepted the *hundis* on 18th November 1936. He has in this connection severely commented on the plaintiff leaving Delhi on 17th November and entrusting the work to some other persons, and also discarded the statement of Moti Ram on the ground that he had received a cheque for Rs. 20,000 in discharge of his own debt. He has further rejected the testimony of Kidar Nath and Jamna Das stating that they were the brokers of the firm Chandu Lal-Suraj Mal, were men of no position and status and had expressed their inability to identify the writing and signatures of the defendant. In my view, however, all these criticisms are altogether improper and unjustified and could not afford any valid ground for discrediting these witnesses, especially as they had already been relied upon in the previous suit not only by the trial Judge but by the learned Judges of this Court as well. Their statements were quite natural and none of

them appears to have made any attempt either to suppress truth or to suggest falsehood. The plaintiff himself had also appeared in the witness-box and fully explained the circumstances in which the *hundis* were drawn and accepted. It is not disputed that he had paid full consideration for these *hundis* and this being so, it cannot be imagined that a shrewd businessman like the plaintiff, who had already advanced two lacs of rupees to the firm on the foot of a mortgage, would have advanced another sum of Rs. 50,000 without being satisfied that the *hundis* had been properly drawn or accepted by a man of status and wealth. Knowing that the firm was not possessed of any unencumbered property, he would never have advanced such a heavy sum on documents which had been executed in his absence and of the genuineness of which he could not be sure. His anxiety, therefore, in insisting upon the defendant's acceptance before he could advance the loan can easily be understood and appreciated.

[41] The defendant examined a few witnesses in support of his allegations but their evidence was of a negative character and did not advance his case any further. The only evidence that remains to be considered is that of expert witnesses but as usually happens in such cases both the plaintiff and the defendant had succeeded in securing support for their respective allegations and consequently it is, to say the least, inconclusive. I may, however, observe that when requested by the parties to compare the signatures purporting to be those of the defendant on the *hundis* in suit with those which he had admitted to be genuine we examined them with the help of a magnifying glass and they appeared to us to bear a striking resemblance to each other. I will, however, refrain from utilizing this circumstance against the defendant. On the grounds set forth above, I have no hesitation in holding that the plaintiff had succeeded in establishing that the *hundis* in suit were drawn under the authority of the defendant on himself and were later accepted by him in the presence of the witnesses examined by the plaintiff. I would, therefore, allow this appeal, set aside the judgment and decree of the Subordinate Judge and decree the suit against the defendant with costs in both the Courts.

Mohammad Sharif J. — I agree.

D.S./D.H. Vakil High Court Appeal allowed.

SRINAGAR (Kashmir)

[Case No. 72.]

A. I. R. (33) 1946 Lahore 394**FULL BENCH**ABDUL RASHID, ABDUR RAHMAN AND
KHOSLA JJ.*Surain Singh and others —**Plaintiffs — Appellants*

v.

*Ujjagar Singh deceased, represented by
Ranjit Singh and others — Defen-
dants — Respondents.*First Appeal No. 123 of 1940, Decided on 19th
June 1945, from judgment of Beckett and
Bhandari JJ., D/- 20th February 1945.Custom (Punjab) — Succession — Widow—
Widow succeeding collaterally succeeds as re-
presentative of her husband and not in her
own right as heir of last male holder — After
widow's death daughter succeeds in pre-
ference to collaterals in 15th degree.

It is universally recognised by the agricultural communities of the Punjab that whenever a widow acquires property in the family of her husband by means of succession, she acquires it for the benefit of her husband's estate and not on her own behalf. She is carrying on the work of consolidation of the estate which her husband would have carried out had he been alive. The widow cannot form a fresh stock of descent as it is realised that she is merely a representative of her husband so far as property belonging to her husband's family is concerned. Consequently, when the widow of a collateral is allowed by custom to succeed she is to be treated as having done so as a representative of her husband and not in her own right as heir to the last male owner when the next heir after her death has to be traced: ('24) 11 A. I. R. 1924 P. C. 121, *Applied*; *Law laid down in the following rulings*, i. e. ('37) 24 A. I. R. 1937 Lah. 468; ('38) 25 A. I. R. 1938 Lah. 111; ('44) 31 A. I. R. 1944 Lah. 72; ('46) 33 A. I. R. 1946 Lah. 10 and Civil Appeal No. 1090 of 1912, *held good law even after the decision of Full Bench in* ('44) 31 A. I. R. 1944 Lah. 369 :

Held that in the case before the High Court, after the death of brother's widow who had succeeded collaterally to the property of the last male holder, her daughter succeeded to the property in preference to collaterals of the last male holder in the 15th degree.

[P 399 C 1, 2]

*Badri Das, M. L. Puri, D. K. Mahajan and
Mathra Das — for Appellants.**Barkat Ali and D. R. Sawhney —**for Respondents.***ORDER OF REFERENCE**

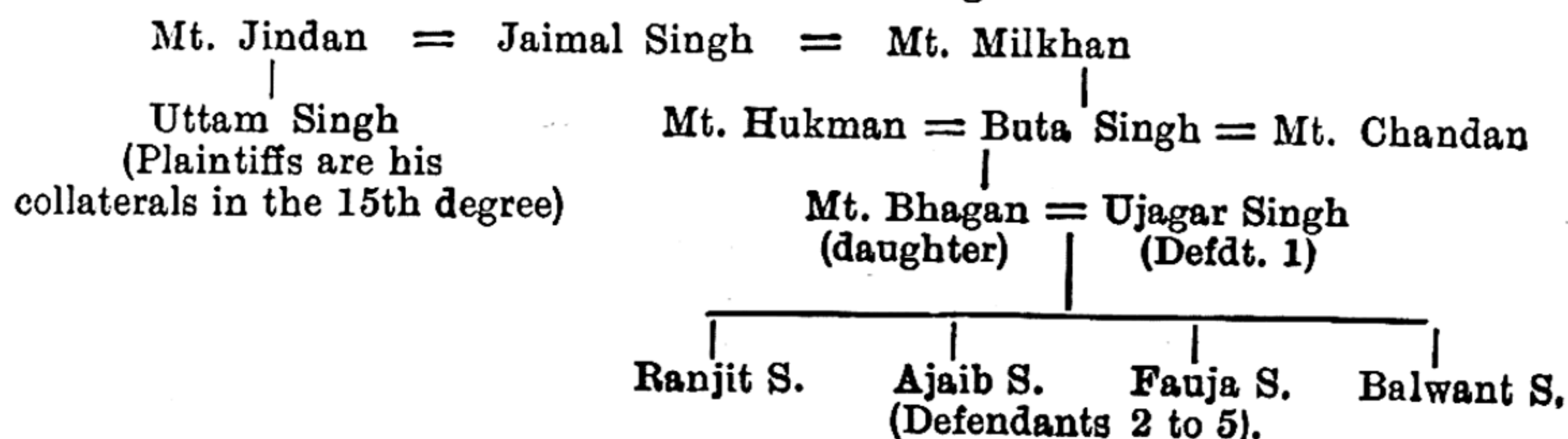
Bhandari J. — This appeal raises a question of general importance which transcends the importance of the case itself. The property in dispute in this case belonged originally to one Jaimal Singh, a Sidhu Jat of village Harchoke of the Lahore district. On his death some 45 years ago, he was succeeded by his two sons Buta Singh and Uttam Singh. Buta Singh died in 1909 and his share of the property devolved on his

two widows, Mt. Hukman and Mt. Chandan. On Uttam Singh's death in 1915 his share of the property was mutated in favour of his mother Mt. Jindan. When the latter died in 1918 the entire estate came to vest in Mt. Hukman and Mt. Chandan, the two widows of Buta Singh. On their death in 1926 and 1934 respectively, all this property including the property which had at one time belonged to their husband's brother Uttam Singh, passed into the hands of Mt. Bhagan, a daughter of Buta Singh. The collaterals of Jaimal Singh consider themselves aggrieved by the order mutating the property in favour of Mt. Bhagan and have brought the present action against her husband and her three sons for possession of 67 plots of land measuring about 3370 kanals and situated in village Harchoke of the Lahore District.

[2] A question has arisen whether the two widows of Buta Singh who succeeded collaterally to the estate of Uttam Singh did so in their capacity as representatives of the husband or whether they did so in their capacity as heirs of Uttam Singh. If they succeeded in the former capacity, it is obvious that their daughter Mt. Bhagan is entitled to the property left by Uttam Singh; if in the latter, it is equally clear that the heirs of Uttam Singh have a better claim. Most of the authorities which bear upon this branch of the law favour the proposition that when a widow is allowed to succeed to the property left by the collaterals of her husband for life, she does so in the same way as her husband would have succeeded if he had been alive when the inheritance opened out: 43 P. R. 1905,¹ 51 P. R. 1909² and A. I. R. 1937 Lah. 468³. A similar view was taken in A. I. R. 1938 Lah. 111⁴ where Dalip Singh J. held that in a case where a widow has succeeded collaterally, after her death, it is the heirs of her husband who have to be sought for and not the heirs of the last male holder of the property. These decisions appear to proceed on the general principle that in such cases the widow represents her husband and stands in his place in the same way as he would have done if he were alive. A contrary view was, however, taken by a Full Bench of this Court in I. L. R. 1944 Lah.

1. ('05) 43 P. R. 1905, *Anar Devi v. Kantan*.2. ('09) 51 P. R. 1909 : 2 I. C. 98, *Gur Dial Singh v. Arur Singh*.3. ('37) 24 A. I. R. 1937 Lah. 468 : 173 I. C. 993, *Diwan Singh v. Natha Singh*.4. ('38) 25 A. I. R. 1938 Lah. 111 : 177 I. C. 420, *Mt. Gangu v. Mt. Hukam Kaur*.

509,⁵ where it was held that when the widow of a collateral is allowed to succeed under custom, she succeeds to the estate of the last owner not as a representative of her husband who is dead but in her own customary right as heir of the last male owner. I am not quite certain whether this decision can be regarded as a final pronouncement on this somewhat difficult and important point of law, so far as the next succession after her is concerned. Two of the Hon'ble Judges who were members of the Full Bench came to a contrary conclusion in A.I.R. 1944 Lah. 72,⁶ for they reverted to the original view which has been expressed in this long series of rulings namely, that when a widow succeeds collaterally the estate that she gets becomes for the purposes of inheritance the estate of her husband and for all future pur-



[8] Jaimal Singh, who died in the year 1896, was owner of a large landed estate. His property was divided in equal shares between his two sons, Uttam Singh and Buta Singh. Buta Singh died in the year 1909, leaving him surviving two widows and a daughter. His property was mutated in the names of his two widows, namely Mt. Hukman and Mt. Chandan. Uttam Singh died in the year 1915, left no near collaterals and his estate was mutated in the name of his mother, Mt. Jindan. On the death of Mt. Jindan in the year 1918, the estate of Uttam Singh was also mutated in the names of Mt. Hukman and Mt. Chandan. Mt. Hukman died in the year 1926, and the entire estate of Jaimal Singh was thereafter held by Mt. Chandan till the year 1934. Mt. Chandan died in the year 1934 and the revenue authorities mutated the entire property, which at one time belonged to Jaimal Singh, in the name of Mt. Bhagan, the daughter of Buta Singh. The present suit was instituted by the plaintiffs, who are collaterals of Uttam Singh in the 15th degree on 3rd July 1937, for possession of the estate of Uttam Singh, on the ground that

poses is treated as the husband's estate. In view of the conflict of decisions, I would refer the following question to the Full Bench :

[3] "When the widow of a collateral is allowed by custom to succeed, is she to be treated as having done so as a representative of her husband or in her own right as heir to the last male owner, when the next heir after her has to be found?"

[4] *Beckett J.* — I agree.

OPINION OF THE FULL BENCH

[5] **Abdul Rashid J.**—A Division Bench of this Court has referred the following question to the Full Bench for decision:

[6] "When the widow of a collateral is allowed by custom to succeed, is she to be treated as having done so as a representative of her husband or in her own right as heir to the last male owner, when the next heir after her has to be found?"

[7] The short pedigree table given below explains the relationship of the parties to this litigation:

Mt. Bhagan could not be treated as the successor of Uttam Singh, as she was the brother's daughter of the last male holder, and as such could not be regarded an heir of Uttam Singh in the presence of his collaterals however remote. The trial Court dismissed the suit and the plaintiffs have preferred an appeal to this Court.

[9] The real question for determination is, whether for purposes of succession to the estate of Uttam Singh, Mt. Chandan is to be regarded as a representative of her husband, Buta Singh or whether she is to be regarded as an independent heir of Uttam Singh. In other words, whether on the death of Mt. Chandan, succession has to be traced to her husband Buta Singh in respect of the estate once held by Uttam Singh, or whether Uttam Singh is to be regarded as the last male holder to whom succession would have to be traced irrespective of the fact that Mt. Chandan held the estate of Uttam Singh for a number of years by virtue of the custom of collateral succession which admittedly prevails among the Jats of the Lahore district. Mr. Badri Das contended that Mt. Bhagan must be regarded as the brother's daughter of Uttam Singh, the last male holder of the property, and as a niece could not be regarded as an heir of Uttam Singh in her own right, the property of

5. ('44) 31 A. I. R. 1944 Lah. 369 : I. L. R. (1944) Lah. 509 (F. B.), Bahadur Chand v. Mt. Daulat.

6. ('44) 31 A. I. R. 1944 Lah. 72 : I. L. R. (1945) Lah. 110 : 214 I. C. 34, Qumr-ud-Din v. Mt. Fateh Bano.

Uttam Singh on the death of Mt. Chandan must revert to the plaintiffs who are collaterals of Uttam Singh, the last male holder in the 15th degree. It was contended on the other hand by the learned counsel for the respondents that Mt. Hukman and Mt. Chandan inherited the property of Uttam Singh by virtue of the custom of collateral succession as representatives of their husband Buta Singh and that for the purposes of tracing successor, Buta Singh must be regarded as the last male holder of the property in dispute.

[10] The question involved in the present reference has formed the subject-matter of discussion in five Division Bench judgments of this Court. This point was considered as early as 1916 by a Division Bench consisting of Sir Shadi Lal, C. J., and Le Rossignol J. in Civil Appeal No. 1090 of 1912.⁷ In that case one Amar Singh died in the year 1904 and was succeeded in the possession of his own estate by his widow Mt. Partapi. Subsequently, Atar Singh, a collateral of Amar Singh in the third degree, died and his estate was mutated in the name of Mt. Partapi as a result of collateral succession of a widow. On Mt. Partapi's death a dispute arose regarding the consolidated estate which she had enjoyed between Ramal Devi, her daughter, and Jangi, a collateral of her husband and of Atar Singh. The whole estate was, however, mutated in favour of Mt. Ramal Devi. Pirthu, a collateral of Atar Singh, then instituted a suit claiming the estate on the ground that he was the nearest heir of the last male holder. The case for Mt. Ramal Devi was that the estate of Atar Singh to which Mt. Partapi had succeeded as representative of her deceased husband Amar Singh would follow the same channel of devolution as the estate which Amar Singh himself possessed in his lifetime. The following observations of the learned Judges may be reproduced *in extenso*:

[11] "Turning now to the estate of Atar Singh, we find that Mt. Partapi succeeded to his estate collaterally in her capacity of representative of her deceased husband. It is always dangerous to generalize on incidents of Customary law but after due consideration it appears to us that the estate inherited from Atar Singh by Mt. Partapi must be regarded as the estate of her husband Amar Singh. She herself had no independent right to succeed to Atar Singh and her succession to Atar Singh had for basis the rights of her husband Amar Singh. Had Amar Singh been alive at the death of Atar Singh he would of course have succeeded and on his death his consolidated estate would have devolved first upon his widow Mt. Partapi and failing near collaterals on her

death upon his daughter Mt. Ramal Devi. By a fiction of custom Mt. Partapi is a representative of her husband and her consolidated estate must therefore be regarded as the estate of her husband Amar Singh."

[12] A similar question arose in A. I. R. 1937 Lah. 468.⁸ In that case one Prem Singh died and his estate was mutated in the name of his widow Mt. Utmi. Thereafter, Mihan Singh and Jowala Singh, brothers of her husband died and their lands were held by their widows on a life-estate. Mt. Narain Devi, widow of Jowala Singh remarried and Mt. Premi, widow of Mihan Singh, died and the lands held by them passed to Mt. Utmi, widow of Prem Singh as the custom of collateral succession prevailed in that family. Mt. Utmi transferred the lands held by her to her daughter and daughter's sons and mutations were effected in their favour. On the death of Mt. Utmi in 1925, the plaintiffs who were the collaterals of Prem Singh, Jowala Singh and Mihan Singh in the 6th degree, instituted a suit for possession of the lands originally held by the three brothers, on the allegation that Mt. Utmi, who held a life-estate in the lands, had no power to make a gift thereof in favour of her daughter and daughter's sons and that they were entitled to succeed to the land on her death. The following observations from this judgment may be reproduced *in extenso*:

[13] "The main point which requires decision in the circumstances is whether on the death of Mt. Utmi this land should be treated as the property of her husband Prem Singh, or that of his brothers Jowala Singh and Mihan Singh, who were the actual last male holders of the land, in order to determine the line of succession on her death. The contention of the learned counsel for the appellants was that the land should be treated as an accretion to the estate of Mt. Utmi's husband Prem Singh, as she succeeded to it only as a representative of her husband's estate and not in any independent right of her own. There seems to be ample authority to support the contention of the learned counsel that when a widow succeeds collaterally as in this case, she does so as a representative of her husband and in the same way as he would have done if he were alive: *cf.* 43 P. R. 1905,¹ 51 P. R. 1909.² In 5 Lah. 192³ it was held by their Lordships of the Privy Council that when a widow acquires property by adverse possession in her capacity as such, the property becomes an accretion to her husband's estate and will be treated as his property. I do not see why the same principle should not govern the present case."

[14] Mr. Badri Das contended that the Privy Council judgment in 5 Lah. 192³ had no applicability to the facts of the case that was being dealt with by Coldstream and

7. Civil Appeal No. 1090 of 1912, Mt. Ramal Devi v. Pirthi Singh.

8. (24) 11 A.I.R. 1924 P. C. 121 : 5 Lah. 192 : 51 I. A. 171 : 80 I. C. 788 (P. C.), Lajwanti v. Safachand.

Bhide JJ. in A. I. R. 1937 Lah. 468,³ and that they had gone wrong in applying the principles of the Privy Council case to the case that was before them. It was pointed out by the learned counsel that in the Privy Council case the widow purported to hold the estate of which she had taken adverse possession as the widow of her husband. In these circumstances, it could not but be held that the property acquired by the widow by adverse possession would enure for the benefit of the estate of her deceased husband and would descend upon her death to the heirs of her husband. In my opinion, the principle underlying the Privy Council case was applicable to the case that was being dealt with by the learned Judges in A. I. R. 1937 Lah. 468.³ This is apparent from the following quotation from the Privy Council judgment :

[15] "It was then argued that the widows could only possess for themselves : that the last widow Devi would then acquire personal title ; and that the respondents and not the plaintiff were the heirs of Devi. This is quite to misunderstand the nature of the widows' possession. The Hindu widow, as often pointed out, is not a life renter but has a widow's estate—that is to say, a widow's estate in her deceased husband's estate. If possessing as widow she possesses adversely to anyone as to certain parcels, she does not acquire the parcels as *stridhan* but she makes them good to her husband's estate. The result is that the mauzas are Jawahar Mal's estate, the respondents having no title to attack them, and as such the plaintiff is entitled as heir to her father to take them."

[16] Applying the principle underlying the Privy Council judgment, it must be held that Mt. Hukman and Mt. Chandan were holding the estate of Uttam Singh as representatives of their husband and not in their independent right. They were consolidating the estate of Buta Singh in exactly the same manner as Buta Singh would have done, had Uttam Singh predeceased him. In the present case also, Mt. Hukman and Mt. Chandan were purporting to hold the estate of Uttam Singh as the widows of Buta Singh.

[17] The next case on the point is A. I. R. 1938 Lah. 111.⁴ In this case the following observations were made by Dalip Singh J.:

[18] "But assuming that this was so, the next question that arises is whether on Mt. Hukam Kaur's death it is the heirs of her husband who have to be traced or the heirs of the last male holder Bur Singh. On this point which is by no means free from difficulty, we have fortunately two authorities to guide us. One is Civil Appeal No. 1090 of 1912⁷ where the same point arose for decision, namely, whether in a case where a widow has succeeded collaterally, as it is called after her death, the heirs of her husband are to be sought or the heirs of the last male holder of the property. It was held in that case that as the widow's right is only

a fictitious extension of her husband's right it is the heirs of the husband who should be sought for on the death of the widow. This Civil Appeal was followed in A. I. R. 1937 Lah. 468³ by a Division Bench of this Court. I see no reason to differ from these rulings and respectfully following them I would hold that on Mt. Hukam Kaur's death it is the heirs of her husband who have to be sought for and not the heirs of Bur Singh as contended by the learned counsel for the appellants."

[19] Skemp J. concurred with Dalip Singh J. and stated that on Mt. Hukam Kaur's death, it is the heirs of her husband who have to be sought for and not the heirs of the last male holder.

[20] The next case on the point is A. I. R. 1944 Lah 72.⁶ The leading judgment in this case was delivered by Mahajan J. who made the following observations :

[21] "Another point was raised by Mr. Pandit and that was that the estate left by Shah Mohammad could not be regarded as the estate of Din Mohammad, the father of defendants 2 and 3, and the daughters had no right to their uncle's property. It seems to me that this argument has no force in view of the past decisions of this Court to the effect that when a widow succeeds collaterally, the estate that she gets becomes for the purpose of inheritance the estate of her husband, and for all future purposes is treated as the husband's estate."

[22] The learned Chief Justice was in entire agreement with the observations of Mahajan J.

[23] Mr. Badri Das relied strongly on the Full Bench judgment of this Court in I.L.R. 1944 Lah. 509,⁵ and contended that when the widow of a collateral is allowed to succeed under the Customary law, she succeeds to the estate of the last male holder in her own customary right and not as a representative of her husband who is dead. The learned counsel urged that when the widow dies, the succession is to be traced to the last male-holder and not to the husband of the widow. It is necessary to examine the facts of the Full Bench case in order to determine whether the observations made in the judgment of the Full Bench are applicable to the present case. One Bahadur Chand obtained a decree for a sum of Rs. 702 against the estate of Sultan Ahmad in the hands of Mt. Daulat Bibi. Sultan Ahmad had three brothers, Haji Ahmad, Gul Ahmad and Yusaf. Mt. Daulat Bibi was the widow of Yusaf. Haji Ahmad died first of all and was succeeded by his other brothers. Yusaf then died and was succeeded by his widow. Gul Ahmad died next and was succeeded by the widows of Yusaf and Sultan Ahmad. Sultan Ahmad died last and was succeeded by the widow of Yusaf. The decree-holder, in execution of his decree,

attached the ancestral land left by Sultan Ahmad. An objection was taken to this attachment by Mt. Daulat Bibi on the ground that the land being ancestral in the hands of Sultan Ahmad who was governed by custom, and having come in her hands, she must be regarded as the "subsequent holder" and that the land was, therefore, not liable to attachment and sale under the provisions of S. 9, Debtors' Protection Act. It was pointed out by Mahajan J. that the point that arose for decision was whether a widow in possession of the estate of her husband or a mother succeeding to her son, or a daughter inheriting the property of her father, or a widow inheriting collaterally or any other woman taking a limited estate fall within the meaning of the word "subsequent holder" as used in S. 9, Debtors' Protection Act. He then held that the words "subsequent holder" had acquired a technical meaning and that only male reversioners or collaterals of the last male holder could be included within the term "subsequent holder." The learned Judge relied on the case in 4 P. R. 1913⁹ and held that the words "next holder" had been used by the Full Bench to denote a male reversioner or a collateral of the last male holder and that as a widow was not a male reversioner or a collateral of the last male holder, she could not be included in the term "next holder" or "subsequent holder." The question before the Full Bench had been fully answered by the learned Judge in that portion of the judgment which is printed on pp. 509 to 517. After the question had been answered, the learned Judge observed that it had been urged by the learned counsel for the respondent that 'when a widow under custom inherits collaterally she acquires the status of a collateral and her person is by fiction the person of her deceased husband.' The learned Judge then proceeded to repel this argument. The observations of the learned Judge on pp. 518 and 519 were in the nature of *obiter dicta*. In these circumstances, it cannot be said that the Full Bench judgment in the case of Bahadur Chand overruled the four Division Bench judgments referred to above. Moreover, the learned Judge took pains to explain that he was not in any way dissenting from those decisions which laid down that for the purposes of tracing succession when a widow inherits property collaterally, it becomes the property of her husband. This

is clear from the following quotation from the Full Bench judgment:

[24] "Further the fiction that when a widow inherits property collaterally it becomes the property of her husband is only of limited applicability and has been only applied for the purpose of tracing succession to property after the death of the widow."

[25] These observations show that Mahajan J. was not dissenting from the proposition laid down in the four previous Division Bench judgments of this Court so far as the question of tracing succession to the widow was concerned. The observations of the Full Bench, in my opinion, do not in any manner shake the authority of the four Division Bench judgments referred to above.

[26] The last Division Bench judgment, dealing with the question which forms the subject-matter of the present reference, was delivered by Achhru Ram and Mahajan JJ. on 8th February 1945 in Regular First Appeal No. 235 of 1941.¹⁰ Achhru Ram J. wrote the leading judgment and agreed with the conclusion arrived at by the four Division Benches to which reference has already been made. The Full Bench judgment in the case of Bahadur Chand was quoted before Achhru Ram and Mahajan JJ. The learned Judges, however, were of the opinion that the Full Bench judgment expressly saved the operation of the previous Division Bench judgments. As Mahajan J. was himself a party to the last judgment, it must be held that he approved of the four Division Bench judgments which have been relied upon in the present case on behalf of the respondents.

[27] Mr. Badri Das contended strenuously that the result of the Full Bench judgment in I. L. R. 1944 Lah. 509⁵ is that the estate in the hands of the widow who succeeds collaterally is liable for the debts of the last male holder; that is, for purposes of payment of debts the estate in the hands of Mt. Chandan would have to be regarded in the present case as the estate of Uttam Singh, while for the purposes of tracing succession, the estate of Uttam Singh would have to be taken as the estate of Buta Singh, the husband of Mt. Chandan. The learned counsel urged that this was highly illogical. The Court has to determine what was the estate which the widow took when she succeeded collaterally and what are the incidents which attach to such an estate. The estate

9. ('13) 4 P. R. 1913 : 15 I. C. 866 (F. B.), Jagdip Singh v. Narain Singh.

10. Reported in ('46) 33 A. I. R. 1946 Lah. 10 : 222 I. C. 469, Akhtar Abbas v. Nazar Abbas.

must be treated on the same footing whether it is a question of payment of debts or whether it is a question of tracing succession. The learned counsel urged that findings on questions of custom can be given either by ascertaining what the custom is or by drawing deductions from an ascertained custom. If deductions are to be drawn from an ascertained custom, the deductions must be logical in their operation. In my opinion, it is universally recognised by the agricultural communities of this province that whenever a widow acquires property in the family of her husband by means of succession, she acquires it for the benefit of her husband's estate and not on her own behalf. She is carrying on the work of consolidation of the estate which her husband would have carried out had he been alive. The widow cannot form a fresh stock of descent as it is realised that she is merely a representative of her husband so far as property belonging to her husband's family is concerned. In these circumstances, the property in the hands of a widow who succeeds collaterally must be treated as the property of her husband for the purpose of succession on the death of the widow. So far as the payment of debts is concerned, the property before reaching the widow had already become liable for the payment of debts of the last male holder. The widow not being a 'subsequent holder,' the estate in her hands is not exempt from the payment of debts incurred by the person whose property has devolved on the widow as a result of the custom of collateral succession. In these circumstances, it cannot be held that the Full Bench decision in the case of Bahadur Chand governs the present case.

[28] Mr. Barkat Ali contended that from 1912 up to 1942 it had been consistently laid down that a widow succeeding collaterally represents her husband and that on her death, succession has to be traced to her husband and not to the last male holder. It was urged that the view taken by several Division Benches of this Court extending over a period of 30 years should not be disturbed because where a decision of the Courts originally wrong or an erroneous conception of the law has been held for a long time and has become the basis on which rights have been regulated and arrangements as to property made, the maxim *communis error facit jus* should be applied. In this connection reliance was placed on the Full Bench judgment of this

Court in 47 P. L. R. 107.¹¹ In my opinion, the doctrine of *stare decisis* has no applicability in the present case. The judgment in Regular Second Appeal No. 1090 of 1912⁷ was not even published in any legal publication. The next judgment of this Court dealing with the point now in dispute was given in the year 1937 when the present suit had already been instituted.

[29] For the reasons given above, I am in respectful agreement with the five Division Bench judgments dealt with above and I further hold that the Full Bench judgment in I. L. R. 1944 Lah. 509⁵ does not in any way shake the authority of the five Division Bench judgments dealing with the point involved in the present reference. My answer to the question referred to the Full Bench is that when the widow of a collateral is allowed by custom to succeed she is to be treated as having done so as a representative of her husband when the next heir after her death has to be traced. The record will now be submitted to the Division Bench for the final disposal of the appeal.

[30] **Abdur Rahman J.**—I agree.

[31] **Khosla J.**—I agree.

Judgment of the Division Bench

[32] Counsel for the parties are agreed that in view of the decision of the Full Bench the appeal must be dismissed. Let the appeal be dismissed with costs.

K.S.

Appeal dismissed.

11. ('45) 32 A. I. R. 1945 Lah. 123 : I. L. R. (1945) Lah. 373 : 221 I. C. 14 : 47 P. L. R. 107 (F.B.), Allah Bakhsh v. Chet Ram.

[Case No. 73.]

A. I. R. (33) 1946 Lahore 399

FULL BENCH

HARRIES C. J., MAHAJAN AND ACHHRU RAM JJ.

Nanak, deceased, represented by Umra and others—Appellants

v.

Ahmad Ali, Plaintiff and Barkat, Defendant—Respondents.

Second Appeal No. 558 of 1943, Decided on 1st March 1945, from judgment of Achhru Ram J, D/- 30th October 1944.

(a) Civil P. C. (1908), O. 41, R. 4 — Applicability.

Rule 4, Order 41 cannot be applied where the non-appealing plaintiff or defendant, as the case may be, has not been impleaded in the appeal at all and is not before the appellate Court: ('28) 15 A. I. R. 1928 Lah. 43; 110 I. C. 250 (Lah.) and 40 P. L. R. 6, *Rel. on.* [P 402 C 1]

C. P. C.—

('44) Chitaley, O. 41 R. 4 N. 6 Pt. 6.

('41) Mulla, Page 1159 Pt. (t).

(b) Civil P. C. (1908); O. 22, R. 3—*N* and *K* jointly purchasing house—Suit by plaintiff for declaration of his title to house decreed—Appeal by *N* and *K*—*N* subsequently dying and his legal representatives not brought on record in time—Appeal does not abate as a whole and *K* can continue same.

N and *K* jointly purchased a house from one *G*. Plaintiff who was in possession of the house brought a suit for declaration of his title to the house. The suit was decreed. *N* and *K* appealed from the decree. Subsequently *N* died and his legal representatives were not brought on record within the prescribed period of limitation with the result that the appeal abated so far as *N* was concerned. The question was whether the abatement of appeal of *N* made the whole appeal incompetent:

Held that if *K* succeeded in appeal the only effect would be that declaration granted to the plaintiff against him would cease to operate but the declaration granted against *N* would stand. The plaintiff could have initially instituted two separate suits against *N* and *K* and inasmuch as the suit could, in the first instance, have been brought against *K* without impleading *N*, there was no legal bar to the competency of an appeal by *K* alone merely because the plaintiff chose to bring one suit against *N* and *K* denying his title to the suit property.

[P 403 C 2; P 404 C 1]

Held further that even if the suit was regarded not merely as one for a declaration but as one claiming relief in respect of the purchase the appeal by *K* was not incompetent.

[P 404 C 1]

Where the shares of several defendants in the property in dispute are either ascertained or ascertainable, the abatement of the suit or appeal of or against one does not entail its abatement in so far as the others are concerned.

[P 404 C 1]

Even though the decree obtained by the plaintiff in respect of *N*'s share had become final and conclusive by reason of *N*'s appeal having abated, *K*'s appeal in respect of the property purchased by him could still proceed and if that appeal eventually succeeded, the decree passed in such appeal could in no way be regarded as inconsistent with the decree already obtained by the plaintiff against *N*. Hence the abatement of *N*'s appeal did not render *K*'s appeal incompetent: ('28) 15 A. I. R. 1928 Lah. 572 (F. B.), *Rel. on.*

[P 404 C 2]

C. P. C.—

('44) Chitaley, O. 22, R. 3, Note 23, Pt. 3.

('41) Mulla, page 927.

(c) Civil P. C. (1908), O. 22, Rr. 3 and 11 — Decree for possession or ejectment against trespassers — Each has independent right of appeal — Only one of them appealing — Effect of allowing appeal, upon rights of non-appealing trespassers, stated.

Where a person claiming to be the true owner of certain property obtains a decree for possession of that property against trespassers, each trespasser has an independent right to appeal against the decree and the mere circumstance that one of the defendants does not appeal from the decree or even confesses judgment, would not disentitle the other to appeal. In effect and in substance in a case of this type there are as many decrees for ejectment or dispossession as there are trespassers. One trespasser agreeing to a decree being passed against him or not appealing from a decree after it has been passed, has the effect only of dislodging him from the property. If his other co-defendant files the appeal and succeeds, it cannot be said that in

consequence of the acceptance of his appeal two inconsistent decrees will come into existence. The decree that becomes final against the non-appealing defendant is only a decree for his ejectment. The effect of the acceptance of the appeal of the co-defendant will be that he cannot be ejected. Both the defendants claiming under wholly independent rights, one will not be affected by the decree passed against the other. [P 403 C 1, 2]

C. P. C.—

('44) Chitaley, O. 22, R. 3, Note 23.

(d) Transfer of Property Act (1882), S. 45 — Two persons purchasing property — Their shares not specified in sale-deed — They must be presumed to have purchased in equal shares.

Joint tenancy is wholly unknown to India. Hence, when two persons jointly purchase a property they must be deemed to have acquired a tenancy in common. Merely because their shares are not specified in the sale-deed they cannot be regarded as holding the property or claiming title thereto as joint tenants in the sense in which that expression is understood in English law. In the absence of specification of shares in the sale-deed the two should be presumed to have purchased the property in equal shares: ('29) 16 A. I. R. 1929 All. 817, *Rel. on.*

[P 404 C 1]

T. P. Act —

('45) Chitaley, S. 45, Note 7.

('36) Mulla, Page 202, Pt. (y).

Asa Ram Aggarwal — for Appellants.

Mohd. Yusaf Khan — for Respondents.

ORDER OF REFERENCE

Achhru Ram J.—Ahmad Ali, plaintiff-respondent brought a suit for the cancellation of a sale deed executed by Gumani, defendant 1, in favour of Nanak and Khair-ud-Din, defendants 2 and 3. This suit was dismissed by the Court of first instance. However, the learned Senior Sub-Judge of Ambala allowed the plaintiff's appeal and decreed his claim. Against this decree Nanak and Khair-ud-Din, defendants 2 and 3, filed an appeal in this Court. When the appeal came up for hearing the learned counsel for the plaintiff-respondent raised a preliminary objection that Nanak, one of the two appellants, died on 4th November 1943, and that the application to bring his legal representatives on the record was made on 5th February 1944, that is to say, more than ninety days after his death. It was contended that the appeal had accordingly abated, and inasmuch as there was a joint decree against Nanak and Khair-ud-Din, the appeal should be deemed to have abated in its entirety and could not proceed at all. In the application presented on 5th February 1944 for bringing on record the legal representatives of Nanak, appellant, it was stated that Nanak died on 6th November 1943. The application was supported by an affidavit to the same effect. The respondent

has, however, filed a counter-affidavit stating that Nanak in fact died on 4th November 1943. In support of the statement contained in this affidavit an attested copy of the entry in the deaths register has been produced. In view of the contents of this document, there does not appear to be any reasonable doubt as to Nanak having actually died on 4th November 1943. An application for bringing on record his legal representatives not having been made within the time allowed by law, the appeal of Nanak must undoubtedly be deemed to have abated. The question is whether this abatement should result in the total dismissal of this appeal or whether the appeal of Khair-ud-Din can still proceed.

[2] On behalf of the appellant reliance was placed on the provisions of O. 41, R. 4, Civil P. C., according to which where there are more plaintiffs or more defendants than one in a suit, and the decree appealed from proceeds on any ground common to all the plaintiffs or to all the defendants, any one of the plaintiffs or of the defendants may appeal from the whole decree. It was contended that Khair-ud-Din alone could have filed an appeal from the whole decree without joining Nanak as a co-appellant and that the mere circumstance that Nanak was added as an appellant but that on his death his legal representatives were not brought on the record, should make no difference, and Khair-ud-Din should still be permitted to continue the appeal against the decree in its entirety inasmuch as the appeal proceeds on a ground common to himself and Nanak. This contention of the learned counsel finds support from a number of authorities of this Court. In 84 P. R. 1918¹ a Division Bench of the Chief Court took the view that where several appellants appeal on a ground common to all and one of them dies and application to bring his legal representatives on the record is not made within time, the appeal can notwithstanding proceed on the whole case. In A. I. R. 1928 Lah. 737,² Bhide J. took the same view. In 125 I. C. 180³ Tek Chand and Hilton JJ. held, taking the same view, of the implications of O. 41, R. 4, that where a decree proceeds on a ground common to all the defendants in the case and an appeal is filed by all the defendants, the appeal

can proceed on the whole case even if some of the defendants-appellants die during the pendency of the appeal and their representatives are not impleaded as parties in time. In A. I. R. 1933 Lah. 933⁴ Shadi Lal C. J. and Abdul Qadir J. also decided to the same effect. However, in 15 Lah. 667,⁵ Addison and Monroe JJ., dissenting from 84 P. R. 1918¹ and 125 I. C. 180,³ held that the mandatory words of O. 22, R. 3 (2) were not qualified by the words used in O. 41, R. 4 and therefore the provisions of the latter rule, which did not deal with abatement, could not be applied to negative to a very large extent the provisions of the very specific R. 3 (2) in O. 22, which deals expressly with abatement. They were, therefore, of opinion that where one of several appellants, appealing on a ground common to all, died after the institution of the appeal, and his legal representatives were not brought on the record in time, the appeal abated. The judgment of Shadi Lal C. J. and Abdul Qadir J. in A. I. R. 1933 Lah. 933⁴ does not appear to have been brought to the notice of the Bench. In Calcutta, Madras and Allahabad the view taken is the one that found favour with the learned Judges who decided the earlier Lahore cases. The Patna High Court appears to have taken a different view.

[3] In view of the fact that there is considerable divergence of judicial opinion on this subject and that there are conflicting Division Bench judgments even of this Court, taking diametrically opposite view, I think the question involved is a fit one for consideration and authoritative decision by a Full Bench. Accordingly I direct that the papers may be laid before the Hon'ble the Chief Justice for reference of the question involved in the preliminary objection raised by the counsel for the respondent to a Full Bench if his Lordship is so pleased.

Judgment of the Full Bench

[4] **Achhru Ram J.**—The facts that have given rise to this reference are stated in my Order of Reference dated 30th October 1944 and need not be recapitulated. The question that arises for decision in the reference is whether the abatement of the appeal of Nanak, one of the co-appellants, in consequence of his legal representatives not having been brought on the record within the period

1. ('18) 5 A. I. R. 1918 Lah. 227 : 84 P. R. 1918 :

46 I. C. 50, Piyare Lal v. Chura Mani.

2. ('28) 15 A. I. R. 1928 Lah. 737 : 112 I. C. 455, Johaga v. Birchand.

3. ('30) 125 I. C. 180 (Lah.), Bhagwan Sahai v. Nanga.

4. ('33) 20 A. I. R. 1933 Lah. 933 : 149 I. C. 527, Ram Kishen v. Bhim Singh.

5. ('34) 21 A. I. R. 1934 Lah. 206 : 15 Lah. 667 : 151 I. C. 784, Amin Chand v. Baldeo Sahai Ganga Sahai.

allowed by law after his death makes the whole appeal incompetent and should therefore result in its total dismissal or whether the appeal of Khair-ud-Din, the surviving appellant, can still proceed. At the time of the hearing of the appeal in Chambers, the learned counsel for the appellant placed his reliance on the provisions of O. 41, R. 4, Civil P. C., and contended that, inasmuch as the decree appealed from proceeded on a ground common to all the defendants, any one of them could appeal from the whole decree and in such an appeal the decree as a whole could be reversed. He urged that the circumstance that the appeal was initially filed by both the defendants could make no difference and that the appeal should now be treated as having been filed by Khair-ud-Din alone in which the Court can reverse the decree under appeal in its entirety, even in so far as it affects Nanak who should be deemed to be a non-appealing defendant. In view of the very considerable conflict of judicial opinion as to whether O. 41, R. 4, Civil P. C., could be applied under circumstances like the present, the decision of the question was referred to a Full Bench.

[5] After hearing the learned counsel for the parties we came to the conclusion that even apart from O. 41, R. 4, Civil P. C., the abatement of Nanak's appeal does not make Khair-ud-Din's appeal incompetent and that the latter's appeal can still proceed. Under the circumstances we did not consider it necessary to hear the parties at any length on the question as to the applicability of O. 41, R. 4, Civil P. C., or to examine the various conflicting decisions given by the different High Courts on this much vexed question. I wish, however, to observe that, without pronouncing any final opinion on the question whether the provisions of O. 41, R. 4, Civil P. C., should control those of O. 22, R. 3, Civil P. C., on which there is undoubtedly a conflict of opinion even in this Court, it would not be possible to apply O. 41, R. 4 in the present case. Mr. Asa Ram Aggarwal, the learned counsel for the appellant, had to concede that according to the view consistently taken in this Court R. 4 of O. 41 cannot be applied where the non-appealing plaintiff or defendant, as the case may be, has not been impleaded in the appeal at all and is not before the appellate Court.

[6] In A. I. R. 1928 Lah. 43⁶ a Division Bench of this Court consisting of Tek Chand

and Agha Haidar JJ., made the following observations:

[7] "On the case coming up for hearing before us today Mr. Kishan Dayal for the respondents raised a preliminary objection that it was not competent to Saru Khan to appeal on behalf of all the other co-plaintiffs without making those co-plaintiffs parties to the second appeal as respondents. In reply reliance is placed on O. 41, R. 4, and it is argued that Saru Khan could appeal on behalf of the other co-plaintiffs, without joining them as parties to the appeal. That Rule, however, authorizes one of the plaintiffs to an action in which other co-plaintiffs are also interested, to appeal for the benefit of the latter, only if they are made parties to the appeal. The proposition is too obvious to require discussion. Authority for it will be found in 45 All. 286,⁷ A. I. R. 1924 All. 873,⁸ A. I. R. 1922 Pat. 4⁹ and 53 I. C. 543.¹⁰"

[8] This judgment was followed by Bhide J. in 110 I. C. 250¹¹ and 40 P. L. R. 6.¹²

[9] It is true that some of the other High Courts, notably Calcutta have taken a different view and have held that the appellate Court may, under O. 41, R. 4, reverse or vary the decree in favour of non-appealing plaintiffs or defendants, as the case may be, even though they have not been made parties to the appeal and are not before the Court. There has, however, been no difference of opinion on the subject in this Court, and, on principle, the view taken in the above-mentioned judgments seems to be the only correct view. Nanak's legal representatives not being before the Court and never having been impleaded even as respondents, O. 41, R. 4, Civil P. C., cannot possibly be used for their benefit or in their favour. In A. I. R. 1928 Lah. 43⁶ the non-appealing plaintiffs were added as parties to the appeal under O. 41, R. 20. In the present case the Court was never asked to exercise its discretion under O. 41, R. 20 and to implead the legal representatives of Nanak as parties to the appeal. Even if such a request had been made, the party concerned would have had to satisfy the Court as to the justification for the delay in making the request. It, therefore, seems to me that quite apart from the conflict of judicial opinion noticed in the Order of Reference, O. 41, R. 4, Civil P. C., would have to be ruled out on other grounds.

7. ('23) 10 A. I. R. 1923 All. 211; 45 All. 286; 71 I. C. 321, *Ambika Prasad v. Jhinak Singh*.

8. ('24) 11 A. I. R. 1924 All. 873; 78 I. C. 637, *Balkaran Lal v. Malik Namdar*.

9. ('22) 9 A. I. R. 1922 Pat. 4; 66 I. C. 780, *Jitendra Nath v. Jaku Mandar*.

10. ('18) 5 A. I. R. 1918 Nag. 46; 53 I. C. 543, *Haji Begum v. Shankar Rao*.

11. ('28) 110 I. C. 250 (Lah.), *Fazal Hussain Shah v. Ghulam Rasul*.

12. ('37) 40 P. L. R. 6, *Kartar Singh v. Waryam Singh*.

[10] Although the suit, as initially brought, was one under S. 39, Specific Relief Act for cancellation of the sale-deed, dated 20th January 1941, executed by Gumani in favour of Nanak and Khair-ud-Din on 2nd April 1942, the trial Court made an order to the effect that the plaintiff, not being a party to the sale-deed, could not sue for its cancellation and that he could only sue for a declaration of his own title and had to pay court-fee on the plaint accordingly. In the plaint, as originally filed, the suit had been valued at Rs. 5 for purposes of court-fee as well as of jurisdiction. In pursuance of the above-mentioned order of the learned trial Judge the plaintiff amended the plaint, valued it at Rs. 99 for purposes of jurisdiction and paid a court-fee of Rs. 10 under Art. 17, Sch. 2, Court-fees Act. It is true that even in the amended plaint there was a prayer for the cancellation of the sale-deed. However, both the Courts below treated the suit as one for a pure declaration of the plaintiff's title. In the summary of the pleadings given in the judgment of the trial Court it is stated that the suit was for a declaration that the sale-deed did not affect the plaintiff and was inoperative against him. The only material issue framed was one with regard to the plaintiff's title to the suit property. The judgment of the learned Senior Sub-Judge opens with the following words:

[11] "One Ahmad Ali of village Sadhora, Tahsil Naraingarh, instituted this suit for a declaration to the effect that the sale-deed was void and ineffective against his title to the said property."

[12] It is, therefore, obvious that even the lower appellate Court treated the suit not as one for cancellation of the sale-deed but merely as one for a declaration of the plaintiff's title to the property covered by the sale-deed. Under the circumstances the decree passed by that Court in the plaintiff's favour can only be regarded as a decree declaring him to be the owner of the suit property and therefore not affected by the sale-deed executed by Gumani in favour of the two contesting defendants.

[13] According to the decree passed by the learned Senior Sub-Judge Nanak and Khair-ud-Din were both mere trespassers on the suit land. Where a person claiming to be the true owner of certain property obtains a decree for possession of that property against trespassers, each trespasser has an independent right to appeal against the decree and the mere circumstance that one of the defendants does not appeal from

the decree or even confesses judgment would not disentitle the other to appeal. In effect and in substance in a case of this type there are as many decrees for ejectment or dis-possession as there are trespassers. One trespasser agreeing to a decree being passed against him, or not appealing from a decree after it has been passed, has the effect only of dislodging him from the property. If his other co-defendant files the appeal and succeeds, it cannot be said that in consequence of the acceptance of his appeal two inconsistent decrees will come into existence. The decree that becomes final against the non-appealing defendant is only a decree for his ejectment. The effect of the acceptance of the appeal of the co-defendant will be that he cannot be ejected. Both the defendants claiming under wholly independent rights, one will not be affected by the decree passed against the other.

[14] In the present case, the plaintiff came to Court alleging that he was in possession of the property as an owner. He claimed a declaration of his title against the defendants because the latter had thrown a cloud on his title by obtaining a sale-deed in their favour from one Gumani. Khair-ud-Din's appeal can only succeed if he satisfies the Court that the plaintiff's alleged title to the suit property has not been established. If he succeeds in the appeal, the only effect will be that the declaration granted to the plaintiff against him will cease to operate. It will not necessarily confer any title on Khair-ud-Din himself to the suit house. If, as the plaintiff alleges, he is actually in possession of the house, and Khair-ud-Din brings a suit for possession against him, the latter will succeed if he can make out his own title thereto and not by reason of the dismissal of the plaintiff's declaratory suit. The declaration obtained by the plaintiff against Nanak will stand and Nanak's heirs will, by reason of that declaration, not be entitled to interfere with his possession. The plaintiff could have initially instituted two separate suits for declaration against Nanak and Khair-ud-Din. Either of the two suits would not have been liable to dismissal as incompetent by reason of the necessary parties not being before the Court. The mere circumstance that he could and did join the two defendants in the same suit and asked for a declaration of his title against both does not alter the nature of his claim which in effect and in substance was one for establishment of his title against each of the two defendants. Inasmuch as the suit could,

in the first instance, have been brought against Khair-ud-Din without impleading Nanak, in which case he could have been entitled to appeal from the decree, without taking any notice of what happened to the suit against Nanak, I see no legal bar to the competency of an appeal by him alone, merely because the plaintiff chose to bring one suit against two persons denying his title to the suit property.

[15] Even if the suit is regarded not merely as one for a declaration of the plaintiff's title to the suit property but as one claiming relief in respect of the sale-deed executed by Gumani in favour of Nanak and Khair-ud-Din or one for the setting aside or cancellation of that sale-deed, I do not think that the abatement of Nanak's appeal should make Khair-ud-Din's appeal with regard to his share of the suit house incompetent. It is quite true that in the sale-deed the shares of the two vendees are not specified. That, however, does not mean that they can be regarded as holding the house, or claiming title thereto, as joint tenants in the sense in which that expression is understood in English law. Joint tenancy is wholly unknown in this country and when Khair-ud-Din and Nanak jointly purchased the house, they must be deemed to have acquired a tenancy in common. In the absence of specification of shares in the sale-deed, the two should be presumed to have purchased the house in equal shares. Paragraph 2 of S. 45, T. P. Act provides that in the absence of evidence as to the interests in the fund to which the co-vendees were respectively entitled, or as to the shares of the consideration which they respectively advanced, the co-vendees shall be presumed to be equally interested in the property.

[16] In A. I. R. 1929 ALL. 817¹³ a Division Bench of the Allahabad High Court held that in the absence of specification of the shares purchased by two persons in the sale-deed it must be held that both purchased equal shares. Khair-ud-Din and Nanak thus must be presumed to have purchased the house in equal half shares. By virtue of the purchase each one of them became entitled to one moiety of the house. A Full Bench of this Court in 10 Lah. 7¹⁴ held that where the shares of several defendants in the property in dispute are either ascertained or ascertainable, the abatement of the suit or appeal of

or against one does not entail its abatement in so far as the others are concerned. The following observations made by Sir Shadi Lal, C. J., at p. 13 of the Report are very apposite and fully cover the present case:

[17] "On principle there is no real distinction between one deed transferring the whole of the immovable property in equal shares to A, B, C and D, and four deeds, each conveying one-fourth share in the property, to the four vendees respectively. The death of A pending the appeal undoubtedly debars the Court of appeal from dealing with his share, but his absence does not prevent the Court from determining the controversy with respect to the shares of the remaining three vendees. There might be one decree as to A's share, and another decree of an inconsistent character governing the shares of the other vendees; but as these decrees do not affect the same property, there is no difficulty in giving effect to them. We are here not dealing with a case in which one decision settles the dispute one way, and another decision determines it in an entirely different way, with respect to the same property, so that it becomes impossible for the Court to carry out both the decisions at the same time."

[18] In the present case also, Khair-ud-Din's share of the house and Nanak's share of the house must be deemed to be separate properties and any decree obtained by the plaintiff in respect of the one cannot affect the other. Even though the decree obtained by the plaintiff in respect of Nanak's share has become final and conclusive by reason of Nanak's appeal having abated, Khair-ud-Din's appeal in respect of the property purchased by him can still proceed and if that appeal eventually succeeds, the decree passed in such appeal can in no way be regarded as inconsistent with the decree already obtained by the plaintiff against Nanak. I would accordingly hold that the abatement of Nanak's appeal does not render Khair-ud-Din's appeal incompetent and does not entail the dismissal thereof.

[19] **Harries C. J.**—I agree.

[20] **Mehr Chand Mahajan J.**—I agree.

[On the case coming back to Achhru Ram J., his Lordship made the following order]

[21] **Order.**—The facts giving rise to this second appeal are fully stated in my order dated 30th October 1944 by which I referred the question of the abatement of the appeal to a Full Bench and need not be recapitulated. The result of the decision of the Full Bench is that the appeal is to be deemed to have abated in so far as Nanak's interest in the subject-matter of the appeal is concerned and is to proceed as an appeal by Khair-ud-Din alone in respect of his interest in the subject-matter of the litigation. The learned Senior Subordinate Judge has

13. ('29) 16 A. I. R. 1929 All. 817 : 122 I. C. 666, Abdullah v. Ahmad.

14. ('28) 15 A. I. R. 1928 Lah. 572 : 10 Lah. 7 : 114 I. C. 417 (F. B.), Sant Singh v. Gulab Singh.

rested his decision on the question of the title to the house in suit mainly on Exs. P-1, P-3 and P-4. Exhibit P-1 is a copy of the statement made by Imam Ali the brother of Ghumani, defendant 1, from whom, according to the defendant's case, the aforesaid Ghumani derived his title to the house made in a criminal case under S. 107, Criminal P. C., against Nanak deceased and some others. I agree with the learned Senior Subordinate Judge that this statement being the admission of the predecessor-in-interest of the defendants is admissible in evidence. Exhibit P-3 is a copy of a petition of compromise filed by Nanak and some others in the criminal case mentioned above. It contains a recital to the effect that the dispute in the criminal case was about a house which Nanak agreed to give up. I have no doubt that this document was rightly held by the learned Senior Subordinate Judge to be admissible in evidence to prove an admission by the two contesting defendants. Exhibit P-4 which is a copy of the judgment in the criminal case is, however, wholly inadmissible. Exhibit P-2 is a copy of the statement made by Nanak in a case under S. 107, Criminal P. C., against Rulia and others who formed the other party to the dispute that had given rise to proceedings for keeping the peace. In this statement Nanak expressly claimed to be the owner of the house. I, however, find that the learned Senior Subordinate Judge, while rightly holding these three documents to be admissible in evidence, has either misread them or not read them at all. In Ex. P-1 Imam Ali stated that the house in dispute stood on the land of Ahmad Ali and had been built by him with the permission of the aforesaid Ahmad Ali. This statement can hardly be said to support the case of the plaintiff as disclosed at the trial, namely, that he himself had constructed the house eight or ten years ago. It is, under the circumstances, difficult to see how the learned Senior Subordinate Judge could hold that the story related by the plaintiff found support from Ex. P-1. Exhibits P-1, P-2 and P-3 read together show that Imam Ali gave the house to Nanak some time before 1937, that about the year 1937 Ahmad Ali took it back from Nanak and restored its possession to Imam Ali, that Nanak in the end of 1940 made an attempt, with the help of some other residents of the village, to take forcible possession of the house, but that on proceedings being taken under S. 107, Criminal P. C., he agreed to give up his claim to the house, although origi-

nally he had claimed an exclusive title thereto. The evidence furnished by these documents so far from supporting the plaintiff's version clearly contradicts it.

[22] Under the circumstances, I find it impossible to uphold the finding given by the learned Senior Subordinate Judge as to the plaintiff's ownership of the suit property. However, it is reasonably clear from Ex. P-1 and the other documents mentioned above that the site of the suit house did belong to the plaintiff and that the house was constructed thereon by Imam Ali with his permission. Ghumani defendant 1, as D. W. 5 has stated that he got possession of the house and the site on the death of Imam Ali who was his real brother. He does not, however, say that he was the nearest heir of Imam Ali and had succeeded to the house as such. Unless the house on the death of Imam Ali lawfully devolved on Ghumani, the latter could have no right to convey any title thereto to Nanak and Khair Din. Another question arising in the case is whether after permitting Imam Ali to build on the site the plaintiff retained any interest in the site on which the house was built and, if so, what was the nature or extent of that interest. It is not possible to decide this case without a proper and correct decision of these two questions. If Ahmad Ali made an absolute gift of the site to Imam Ali and absolutely parted with all interest therein, he can have no right to maintain the present suit, or to in any way interfere with any disposition of the property by Imam Ali's brother whether or not the latter has any rightful claim to the property left by the said Imam Ali. If Imam Ali acquired the site from the plaintiff as a tenant or on the usual tenure of a non-proprietary resident, the plaintiff certainly has the right to seek relief against invasion of his rights by any trespasser. If either Ghumani was not the next lawful heir of Imam Ali or even as such heir merely succeeded to the house in suit on the usual tenure of a non-proprietary resident, the defendants, Nanak and Khair Din, could not acquire any lawful title to the possession of the suit house from Ghumani unless, in the latter event, Imam Ali and his successor are also found entitled, by the custom prevailing in the village, to transfer a right of residence in the house occupied by them as non-proprietary residents. The pleadings of the parties being extremely vague and no attempt having been made by the trial Court to elicit the necessary facts no enquiry has been made relating to these questions

which, in my judgment, are the crucial questions in the case. To a very large extent the plaintiff is responsible for this state of affairs because of the defective drafting of the plaint which is an exceedingly vague document. The written statement of the defendants is no less vague and one does not get at the true nature of the controversy between the parties except after reading the evidence led by the parties and the documents produced by the plaintiff. The dispute between the parties being of a petty nature and the parties having already incurred considerable expense in this litigation, I do not think it proper or desirable to take too technical a view of the pleadings and to drive the parties to further litigation. I accordingly allow this appeal and, setting aside the judgments and the decrees of the two Courts below, remit the case to the trial Court for a fresh decision according to law after framing appropriate issues in the light of the observations made above. Before framing the issues, the learned trial Judge will examine the parties carefully and, if necessary, direct an amendment of the pleadings. Costs of this appeal will be costs in the case. Parties have been directed to appear in the trial Court on 14th February 1946.

N.S./D.H.

Case remitted.

[Case No. 74.]

* A. I. R. (33) 1946 Lahore 406

ABDUR RAHMAN AND ACHHRU RAM JJ.

K. Satwant Singh — Petitioner

v.

Provincial Government of the Punjab and another — Respondents.

First Appeal No. 31 of 1945 as Civil Revn. No. 604 of 1945, Decided on 5th July 1945, from judgment of Mahajan J., D/- 3rd May 1945.

(a) Criminal Law Amendment Ordinance (38 [XXXVIII] of 1944), Ss. 4 and 11—Every interlocutory order passed by District Judge disposing of some of objections would not give right of appeal.

Under sub-cl. (2) and (3) of S. 4, the person whose property or money has been attached or any other person or persons who claims or claim any interest or title in the same are called upon to show cause or to make objections to the attachment. And this, strictly speaking, each of them can only do once or by one document and not piecemeal. The person showing cause or making objection can be allowed to add other grounds to those which he has taken at first. This he may be permitted to do in suitable cases. But this cannot be taken to mean that he can be found entitled—even if permitted to add or amend—to show cause more than once or to make more than one objection. The grounds which he may subsequently take will thus be regarded to form a part of the previous petition which has been filed by him or on his behalf. Similarly every interlocutory order

passed by the District Judge disposing of some of the objections cannot be regarded to be in the nature of the 'order' contemplated by S. 11 of the Ordinance and would not give him a right of appeal for it is easy to conceive that the interlocutory order may be against him but the final order may yet be in his favour. The interlocutory order thus passed by the District Judge in regard to the question of jurisdiction or to such issues of law as may in his opinion dispose of the whole of the case or any part thereof, which can be legitimately taken up and decided before the other questions of fact have been heard and determined cannot give a right of appeal under S. 11 unless of course the preliminary issues have been decided against the Crown and the case has been finally disposed of so far at least as the District Judge is concerned. [P 409 C 1]

(b) Civil P. C. (1908), S. 115 — Scope — It is limited to question of jurisdiction, to non-exercise, irregular exercise or illegal assumption of it.

S. 115, limits its scope to the question of jurisdiction alone, the irregular exercise or non-exercise of it or the illegal assumption of it and is not directed against conclusions of law or of fact in which the question of jurisdiction is not involved: (17) 4 A. I. R. 1917 P. C. 71, *Foll.* [P 409 C 2]

(c) Interpretation of statutes—In absence of definition of term, its grammatical and ordinary sense is to be adhered to unless it leads to absurdity or repugnancy.

In the absence of a definition of a term the fundamental principle as to construction of words in statutes is that the grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity or some repugnancy or inconsistency with the rest of the statute in which case the grammatical and ordinary sense of the words may be modified so as to avoid that absurdity and inconsistency, but no farther: *Gray v. Pearson*, 6 H. L. 106, *Rel. on.* [P 410 C 2]

(d) Interpretation of statutes—Rule of strict construction is not violated by permitting words to have their full meaning when it best effectuates intention of Legislature.

The paramount object in construing statutes is to ascertain the legislative intent, and the rule of strict construction is not violated by permitting the words to have their full meaning, or the more extensive of two meanings, when best effectuating the intention. They are indeed, frequently taken in the widest sense, sometimes even in a sense more wide than etymologically belongs or is popularly attached to them, in order to carry out effectually the legislative intent or, to suppress the mischief and advance the remedy. [P 411 C 2]

(e) Interpretation of statutes—Two expressions coupled together — One generally including other—General term excludes specific one.

When two words or expressions are coupled together, one of which generally includes the other, it is obvious that the more general term is used in a meaning excluding the specific one. [P 412 C 1]

(f) Criminal Law Amendment Ordinance (38 [XXXVIII] of 1944), Schedule, item 4—Word 'dominions' includes Government of Burma.

The word 'dominions' in item 4 of the Schedule to the Criminal Law Amendment Ordinance has not been used in a technical sense referring only to such dominions as have been recognised to be such under the Statute of Westminster in 1931.

It is used to denote His Majesty's territory, realm or empire and, therefore, includes the Government of Burma. [P 408 C 2; P 412 C 1]

(g) Criminal Law Amendment Ordinance (38 [XXXVIII] of 1944), Ss. 3 and 4 — Money procured by means of offence described in Schedule deposited in Bank—It can be attached even if such money is mixed up with other money of Bank.

Where a person has procured money by means of an offence described in the Schedule to the Ordinance and has deposited it in a Bank, the bankers with whom the money is deposited are the debtors and agents of the offender and the money in their hands does not cease to be attachable even if its identity is lost by getting mixed up with the other money as long as it is not converted into anything else and remains liable to be paid back in cash to the offender or to his order. The offender cannot be in that case regarded to cease to be the owner of the money deposited by him although it may not have remained in his physical possession and may have come into his debtor's or agent's possession on his behalf. [P 412 C 2]

(h) Criminal Law Amendment Ordinance (38 [XXXVIII] of 1944), S. 4 (1)—Attachment—District Judge whether required to give reasons, stated.

The District Judge is not required by S. 4 (1) of the Ordinance to give any grounds or reasons if he decides to issue the *ad interim* attachment but is only bound to do so if he finds that there were no *prima facie* grounds for believing that the person in respect of whom the application is made has committed any scheduled offence or that he has procured thereby any money or other property.

[P 413 C 1]

(i) Criminal Law Amendment Ordinance (38 [XXXVIII] of 1944), Ss. 3 and 4—Attachment by District Judge—High Court in revision cannot go into question whether he was right or wrong in issuing attachment — Civil P. C. (1908), S. 115.

High Court is not entitled in revision to go into the question whether the District Judge was right or wrong in issuing the attachment, for, he is obviously entitled to do so and no question of jurisdiction being involved, High Court cannot interfere simply because the order was wrong on facts.

[P 413 C 1]

Jai Gopal Sethi, M. L. Sethi and S. Harnam Singh — for Petitioner.

Sir N. P. Engineer, Advocate-General of India, Mushtaq Hussain, Govt. Pleader and R. C. Soni — for Respondents.

ORDER OF REFERENCE

Mahajan J. — This appeal has been preferred under the provisions of S. 11 of Ordinance 38 [XXXVIII] of 1944 and raises a question of some importance on the interpretation of the phraseology employed in certain provisions of that Ordinance. This matter came up before the District Judge in the following circumstances. Cases under S. 420, Penal Code, are pending in the Court of Pandit Chand Narain, Special Magistrate, Punjab and Delhi, at Lahore, against

S. Satwant Singh and Mt. Surjit Kaur his wife and others. On 20th October 1944 an application was made by the Provincial Government under the provisions of S. 3 of the Ordinance for the attachment of properties belonging to S. Satwant Singh and Mt. Surjit Kaur. The properties are given in Schs. 'A' and A-1. This application was accompanied by an affidavit. It was prayed that an *ad interim* attachment of these properties be ordered. On the next day the learned District Judge ordered an *ad interim* attachment of the properties mentioned in the schedules, and issued notice to the respondents. The attachment was made as ordered. In response to the notice issued by the District Judge the two respondents appeared in Court and raised objections to the attachment order that had been issued under S. 4 of the Ordinance. These three objections have been given *seriatim* in the judgment of the learned District Judge. The learned District Judge pronounced against the objectors on all these three matters and disallowed the objections. Hence S. Satwant Singh has preferred this appeal.

[2] Mr. Harnam Singh in the first instance attempted to argue before me that on the basis of the affidavit filed along with the application under S. 3 the District Judge should have issued no *ad interim* order of attachment. That contention of Mr. Harnam Singh I overruled without much argument, for the simple reason that that question is wholly academic at this stage. An *ad interim* order of attachment was issued and has been given effect to. It is of course open to the appellant to urge that there was no material on the record to continue that order and to make it absolute. The second point urged by Mr. Harnam Singh is that it is only the offences that are mentioned in the Schedule to the Ordinance concerning which such an attachment order can be made. The offence mentioned in the affidavit is one under S. 420, Penal Code. That has been dealt with in the Schedule as Item 4 and is in these terms :

[3] "An offence punishable under S. 417 or S. 420, Penal Code, where the person deceived is His Majesty's Government in the United Kingdom or in any part of His Majesty's dominions or the Central or a Provincial Government or a department of any such Government or a local authority or a person acting on behalf of any such Government or department or authority."

[4] Mr. Harnam Singh argued that the offence in the present case with which his clients were charged is an offence to cheat the Government of Burma and that the

Government of Burma was not one of the persons mentioned in Item 4 of the Schedule. He argued that the Government of Burma does not fall in the first description, namely, "His Majesty's Government in the United Kingdom," that it does not fall in the second description, namely, "His Majesty's Government in any part of His Majesty's dominions," and that obviously it does not fall in the third description of statutory persons concerning whom an offence was committed under s. 420, Penal Code. In the view of the learned counsel, the phrase "Central or a Provincial Government" has reference to those bodies which have been constituted under the Constitution Act of 1935. The learned District Judge held that the Government of Burma fell in the second category of persons mentioned in Item 4, namely, it was His Majesty's Government in any part of His Majesty's dominions. The word "dominions" was construed in a more comprehensive sense than it ordinarily is construed in relation to Government enjoying Dominion status under their constitution. In other words, it has been construed as being synonymous with the phrase "possessions." The view of the District Judge is being supported on behalf of the Provincial Government before me. As at present advised I am not prepared to concur in the interpretation placed on the word "dominions" by the learned District Judge and I am also not prepared to subscribe to his view that the phrase "the Central or a Provincial Government" used in Item 4 of the Schedule was a mere surplusage and was used *ex majore cautela*. To my mind the draftsman of Item 4 of the Schedule has left a lacuna which has led to the present ingenious arguments of Mr. Harnam Singh. The matter is of some importance and urgency. Even if I decided the appeal it was bound to go up before a Letters Patent Bench. I, therefore, order with the concurrence of counsel for both the parties that the appeal be heard in the first instance by a Bench of this Court at a very early date. I, further, direct that the papers be laid before his Lordship the Chief Justice for nominating a Bench for hearing this matter as early as possible. Only two points arise for decision before the Bench : (1) Whether the expression "dominions" or the phrase "the Central or a Provincial Government" in item 4 to the Schedule in the Ordinance include the Government of Burma; and (2) whether there is any material on the record for the issue of an attachment order under the Ordinance.

JUDGMENT.

[5] **Abdur Rahman J.**—This is an appeal from an order of the learned District Judge at Lahore overruling certain objections raised on behalf of the appellants to an *ad interim* attachment issued by him on 21st October 1944, under S. 4, Criminal Law Amendment Ordinance (No. 38 [XXXVIII] of 1944) of certain monies and property alleged to have been procured by the appellants by means of an offence described in the Schedule attached to the Ordinance. The appellants did not raise all the objections which they wished to urge against the order issuing the *ad interim* attachment but submitted certain preliminary objections on 28th November 1944, in the first instance. A reply to these was filed on behalf of the Provincial Government on 15th December 1944. Three preliminary issues were framed by the District Judge on 8th January 1945. They read as follows :

[6] "(1) Whether the affidavit filed with the application complies with the requirements of sub-s. (3) of S. 3 of the Ordinance? If not, what is the effect? (2) Whether the offence which is alleged to have been committed is not a scheduled offence by reason of the fact that the Burma Government is not one of the persons enumerated in paragraph 4 of the Schedule? (3) Whether the Ordinance is ultra vires of the Governor-General?"

[7] These objections were overruled on 1st February 1945, and the Court fixed 9th February 1945, for fixing further issues as other objections had been raised on behalf of the appellants in the meantime. This appeal has been preferred from the order overruling the preliminary objections. It came up before a learned Single Judge of this Court who, in view of the importance of the case, referred it to a Bench, although he indicated the points which arose in his opinion for a decision in the case. They are as follows :

[8] (1) "Whether the expression 'dominions' or the phrase 'the Central or a Provincial Government' in item 4 to the Schedule in the Ordinance include the Government of Burma; (2) Whether there is any material on the record for the issue of an attachment order under the Ordinance."

[9] A preliminary objection as to the competency of appeal was raised by the learned Advocate-General of India who appeared on behalf of the respondent on the ground that the order appealed against did not fall within S. 11 of the Ordinance. Although Mr. Jai Gopal Sethi, learned counsel for the appellants, contended in reply that every objection filed on behalf of his clients was for the purpose of showing cause under S. 4 or S. 6, and every order passed by the District Judge

on such objections would be consequently appealable by the aggrieved party, yet I am of the view that it is not possible to interpret S. 11 of the Ordinance in the manner suggested by him and the objection raised by the learned Advocate-General of India must prevail. A right to appeal has been conferred by S. 11 of the Ordinance on the Provincial Government or on any person who has shown cause under S. 4 (or S. 6 which applies to a transferee and has, therefore, no application to the present case) if either of them feels aggrieved by the District Judge's order allowing or disallowing an objection raised by the person whose money or property had been attached or by any other person who claimed an interest or title in the property attached. Under sub-cl. (2) and (3) of S. 4, the person whose property or money has been attached or any other person or persons who claims or claim any interest or title in the same are called upon "to show cause" or "to make objection" to the attachment. And this, strictly speaking, each of them can only do once or by one document and not piecemeal. I do not, however, mean to say that the person showing cause or making objection cannot be allowed to add other grounds to those which he has taken at first. This he may be permitted to do in suitable cases. But this cannot be taken to mean that he can be found entitled — even if permitted to add or amend—to show cause more than once or to make more than one objection. The grounds which he may subsequently take will thus be regarded to form a part of the previous petition which has been filed by him or on his behalf. Similarly, every interlocutory order passed by the District Judge disposing of some of the objections cannot be regarded to be in the nature of the 'order' contemplated by S. 11 of the Ordinance and would not give him a right of appeal for, it is easy to conceive that the interlocutory order may be against him but the final order may yet be in his favour. The interlocutory order thus passed by the District Judge in regard to the question of jurisdiction or to such issues of law as may, in his opinion, dispose of the whole of the case or any part thereof, which can be legitimately taken up and decided before the other questions of fact have been heard and determined cannot give a right of appeal under S. 11 unless, of course, the preliminary issues have been decided against the Crown and the case has been finally disposed of so far at least as the District Judge is concern-

ed. If I were not to construe Ss. 4 and 11 of the Ordinance in that manner, every order passed in respect of every ground taken in support of the objection would give rise to an appeal and the proceedings would then drag on almost interminably. This surely was not the intendment of these sections.

[10] Although, therefore, I am inclined to agree with the learned Advocate-General of India that no appeal is in the present case competent, I would accede to the appellants' prayer and allow this appeal to be converted into a revision for the simple reason that at least one of the points which have been raised in this case goes to the root of the matter and that it is not desirable to prolong the agony of the appellants if we are inclined to accept their contention. Even otherwise, it would be better if the important question of jurisdiction at least is decided at this stage rather than left to be determined after the whole case has been heard and decided by the Court below. I propose to confine myself however to the question of jurisdiction advisedly. Under S. 5 (2), the District Judge has been directed to follow the procedure and exercise all the powers of a Court in hearing a suit under the Code of Civil Procedure. And if I permit this appeal to be converted into a revision, I must hear it under S. 115, Civil P. C., which, according to the decision of their Lordships of the Privy Council in 44 I. A. 261,¹ limits its scope to the question of jurisdiction alone, "the irregular exercise or non-exercise of it or the illegal assumption of it" and "is not directed against conclusions of law or of fact in which the question of jurisdiction is not involved."

[11] The term "scheduled offence" according to S. 2 of Ordinance No. 38 [XXXVIII] of 1944 means an offence which has been specified in the schedule to the Ordinance and it is only where the Provincial Government has reason to believe that any person has committed any scheduled offence that an application to the District Judge for the attachment under this Ordinance of the money or other property, which it (the Provincial Government) believes a person to have procured by means of the offence, can be made under the Ordinance or attachment ordered by the Court. Five offences are specified in the Schedule in connection with which the property is liable to be attached. As the offence which the appel-

1. (17) 4 A. I. R. 1917 P. C. 71 : 40 Mad. 793 : 44 I. A. 261 : 40 I. C. 650 (P. C.), Balakrishna v. Vasudeva.

lants are alleged to have committed is stated at No. 4 of the Schedule, I reproduce it in *extenso* and underline (*italicised here*) the words which are, in view of the contentions advanced by the parties, of considerable importance :

[12] "An offence punishable under S. 417 or S. 420, Penal Code, where the person deceived is *His Majesty's Government in the United Kingdom or in any part of His Majesty's dominions* or the Central or a Provincial Government or a department of any such Government or a local authority or a person acting on behalf of any such Government or department or authority."

[13] It is contended by the learned Advocate-General of India on behalf of the Crown that in so far as His Majesty's Government in Burma which formed and still forms part of His Majesty's *dominions* was the person deceived, the property and the money alleged to have been procured by the petitioners who were believed to have committed the above stated scheduled offence was legitimately ordered to be attached by the District Judge on the application of the Provincial Government. Learned counsel for the petitioners, on the other hand, contends that the word "dominions" in item 4 of the Schedule has been used in a technical sense and refers only to such dominions as have been recognised to be such under the Statute of Westminster in 1931. It was not denied that Burma did and does continue to form part of His Majesty's Empire even after it ceased to be a part of India under S. 46, Constitution Act, or even after it was overrun by the Japanese in 1942. But it was contended that the term "dominion" has come to be regarded as a term of art after the Statute of Westminster and is invariably used to denote the self-governing dominions such as Canada, New Zealand, etc. It should therefore be, it was submitted, held to have been employed in item 4 of the Schedule of the Ordinance in that sense and not in that of a country over which His Majesty has supreme control or in other words which forms a part of His Majesty's Empire or Realm. It was urged that unless the term 'dominion' is held to have been used in that technical and limited sense, a large number of words in item 4 of the Schedule would be found to have been put in superfluously which would be in conflict with settled canons of interpretation of statutes that the construction which leaves any part of their language to be without any effect should be avoided and that "such a sense is to be made upon the

whole as that no clause, sentence or word shall prove superfluous, void or insignificant if by any other construction they may all be made useful and pertinent."

[14] The term 'dominion' has not been defined either in the General Clauses Act (10 [X] of 1897) or in the English Interpretation Act 1869 (52 and 53 Vict. Chap. 63). In the absence of a definition, the fundamental principle as to construction of words in statutes as in wills or other written instruments is as held in 6 H. L. 106³ that

[15] "the grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity or some repugnancy or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified so as to avoid that absurdity and inconsistency, but no farther."

[16] In the absence of a definition, therefore, I must, first of all find out its dictionary meaning and then see whether that leads to some absurdity, repugnancy or inconsistency. The word 'dominion' comes from the Latin word *dominium* (dominus lord) and means in English language a sovereign or supreme authority ; the power of ruling or governing ; and domination. It signifies sovereignty, control and territory of sovereign or government. In law it means the right of absolute possession and use, ownership and a country under a particular government. It is often used in plural, e.g., Papal dominions.

[17] Let me now see whether the word "dominions" in item 4 of the Schedule to the Ordinance, if used to denote His Majesty's territory, realm or empire (and this would certainly include Burma) can lead to any absurdity, repugnancy or inconsistency with the rest of the Ordinance or I must avoid this construction as it leaves some part of the language of item 4 in the Schedule to be without any effect and must necessarily take that word to convey a sense that no clause, sentence or word in item 4 of the Schedule shall prove 'superfluous.' I have gone through the whole of the Ordinance carefully, and find nothing in it which would lead the placing of the grammatical construction on that word to any absurdity, repugnancy or inconsistency. Nor was anything said by learned counsel for the petitioner that would suggest anything of that kind. It was, however, contended that if the word 'dominions' is used in that sense, it will make the sentences 'His Majesty's Government in the United Kingdom' and 'the Central or a Provincial Government or

2. 6 H. L. 106, *Gray v. Pearson*.

a department of any such Government' to be superfluous. In that connection our attention was drawn to the definition of the terms 'British Possession' and 'Colony' defined in the General Clauses Act (10 [X] of 1897) and the Interpretation Act. But these, if anything, go against his contention as both of the terms "British Possession" and 'Colony' have been defined to mean part of His Majesty's *dominions* which must necessarily be larger than the territories covered by these definitions. The facts that the United Kingdom — being the possessor itself — was excluded from the definition of "British Possession" and the British Islands and British India, which included Burma at the time when it was defined were excluded from the definition of "Colony" make it clearer still. The point, however, remains that 'dominions' must cover a larger field or area than the territories covered by the definition of 'British Possession' and 'Colony' and it is that word which has been used in item 4 of the Schedule to the Ordinance. The use of the word 'dominions' in the definition of British India as given in the General Clauses Act (Act 10 [X] of 1897) leads to the same conclusion.

[18] But it was vehemently urged that if we were to place that interpretation on the word 'dominions' we would have to hold that the Legislature has used a number of superfluous words and we must try and interpret that item in such a way as to exclude the possibility of the Legislature having used a superfluous or a redundant word or words. In this connection our attention was drawn to what was said by Craies in his book on Statute Law (Edn. 4) at pp. 99/100.

[19] "It is a good general rule in jurisprudence," said the Judicial Committee in (1857) 11 Moore P. C. 325³, at p. 337, 'that one who reads a legal document whether public or private, should not be prompt to ascribe—should not without necessity or some sound reason impute to its language tautology or superfluity, and should be rather at the outset inclined to suppose every word intended to have some effect or be of some use.' And this is as justly and even more tersely put by Lord Bramwell, who says in (1889) 14 A. C. 153⁴ at p. 169: 'The words of a statute never should in interpretation be added to or subtracted from, without almost a necessity'."

[20] But assuming that the sentences or words referred to by learned counsel for the petitioners are found on that construction,

to be superfluous, it was observed by Jessel M. R. in (1881) 8 Q. B. D. 421⁵ at p. 424 that :

[21] "It may not always be possible to give a meaning to every word used in an Act of Parliament, and many instances may be found of provisions put into statutes merely by way of precaution."

[22] "Nor is surplusage or even tautology," as observed by Lord Macnaghten in (1891) A. C. 531⁶ at p. 589,

[22a] "wholly unknown in the language of the Legislature It is not so very uncommon in an Act of Parliament to find special exemptions which are already covered by a general exemption."

[23] Lord Hatherley observed in (1871) 6 Ch. A. 421⁷ at p. 426 as follows :

[24] "I do not attach much importance to the exception of insurance companies in S. 27 of 20 & 21 Vict. c. 14. I think it is mere surplusage, and unfortunately such surplusage is not uncommon in Acts of Parliament."

[25] That is why Lord Selborne, L. C. observed in (1883) 12 Q. B. D. 224⁸ at p. 229 to the following effect :

[26] "But the use of tautologous expressions is not uncommon in statutes and there is no such presumption against fulness or even superfluity of expression in statutes or other written instruments as amounts to a rule of interpretation controlling what might otherwise be their proper construction."

[27] Conceding, therefore, without admitting, that the construction which I am inclined to place on the word 'dominions' in accordance with its grammatical meaning renders a portion of the language used in item 4 to be superfluous, I would not be, I feel, committing any mistake if I gave to that word its ordinary meaning particularly when "the paramount object in construing statutes is," as held in 6 Wallace 396⁹

[28] "to ascertain the legislative intent, and the rule of strict construction is not violated by permitting the words to have their full meaning, or the more extensive of two meanings, when best effectuating the intention." "They are, indeed, frequently taken," as held in (3 Rep. 7b),¹⁰ "in the widest sense, sometimes even in a sense more wide than etymologically belongs or is popularly attached to them, in order to carry out effectually the legislative intent," or, to use Lord Coke's words, "to suppress the mischief and advance the remedy."

[29] That the construction which I am inclined to place on the word 'dominions'

5. (1881) 8 Q. B. D. 421 : 51 L. J. Q. B. 82 : 45 L. T. 697 : 30 W. R. 174, *Yorkshire Fire Insurance Co. v. Clayton*.

6. (1891) 1891 A. C. 531 : 61 L. J. Q. B. 265 : 65 L. T. 621, *Income-tax Commissioners v. Pemsel*.

7. (1871) 6 Ch. A. 421 : 40 L. J. Ch. 562 : 19 W. R. 484, *In re Bank of London and National Provincial Insurance Association*.

8. (1883) 12 Q. B. D. 224 : 53 L. J. Q. B. 165 : 50 L. T. 312 : 32 W. R. 452, *Hough v. Windus*.

9. 6 Wallace 396, *U. S. v. Hartwell*.

10. 3 Rep. 7b, *Heydon's Case*.

3. (1857) 11 Moore P. C. 325, *Ditcher v. Denison*.

4. (1889) 14 A. C. 153 : 58 L. J. Q. B. 594 : 61 L. T. 1 : 38 W. R. 209, *Cowper Essex v. Acton Local Board*.

does suppress the mischief and advance the remedy is clearly established by the words of the preamble of the Ordinance which could not have been intended to allow the offences punishable under S. 417 or S. 420, Penal Code, to go unpunished when the person deceived happened to be His Majesty's Government in Burma which was and is undoubtedly a part of His Majesty's dominions.

[30] I have so far assumed that the criticism levelled against the construction which I am inclined to place on the word 'dominions' is correct in so far as by placing that construction, some of the other words or sentences, to which reference has already been made, become superfluous. But I have no doubt that these words were used *ex majori cautela* with the object of removing a doubt that having regard to the definition of the term 'British Possession' in the General Clauses Act, the Provincial Legislature or Government had no separate entity or existence and being under the Central Legislature or Government, it was not a 'person' within the meaning of item 4 of the Schedule to the Ordinance and no offence could have been committed in respect thereof. Similarly, the words 'His Majesty's Government of the United Kingdom' were employed on account of the definition of that very term 'British Possession' according to which the United Kingdom was excluded. Moreover "when two words or expressions," as stated by Maxwell at p. 283, (Edn. 8), "are coupled together, one of which generally includes the other, it is obvious that the more general term is used in a meaning excluding the specific one."

[31] The word 'dominions' if read in that way will exclude the other parts of British Dominions which have been specifically mentioned in item 4 of the Schedule. Viewed thus the criterion as to surplusage disappears and the petitioners' contention must accordingly be in that respect repelled.

[32] The next contention advanced on behalf of the petitioners was that the District Judge had no jurisdiction to issue an *ad interim* injunction in the case of monies which had been deposited by either of them in a Bank either in their own names jointly or separately or in the names of some other person or persons. This submission was attempted to be supported by the concluding words of S. 3 (1) of the Ordinance where property alone and not money is stated to be attachable. The money, it was urged, which the Provincial Government believes the petitioners to have procured by means

of the offences ceases to be attachable as such when it cannot be earmarked and has lost its identity by becoming mixed up with the other monies of the Bank with which it was deposited. The other property of the petitioners might be according to learned counsel for the petitioners attachable, but money in the hands of their bankers is not so. There is no force in my opinion in that contention either. It cannot be disputed that the bankers with whom the money was deposited were the debtors and agents of the petitioners and the money in their hands did not, in my judgment, cease to be attachable even if its identity was lost by getting mixed up with the other money as long as it was not converted into anything else and remained liable to be paid back in cash to the petitioners or to their order. The petitioners cannot be in that case regarded to cease to be the owners of the money deposited by them although it may not have remained in their physical possession and may have come into their debtor's or agent's possession on their behalf. If, after converting say a Government Currency Note of the value of Rs. 100 into 20 Government Currency Notes of Rs. 5 each, the petitioners can still be regarded to have procured Rs. 100 by means of an offence—and I am assuming for the purposes of this argument that the original note of Rs. 100 had been procured by means of an offence—I have no doubt that the twenty notes of Rs. 5 each would have to be, even after their conversion, regarded as having been procured by means of an offence although no offence may have been committed for the purpose of converting the former into the latter. The currency of the country is interchangeable and the stigma attaching to the first acquisition would continue to attach under S. 3 of the Ordinance to any other monies in the hands of the petitioners or of their debtors and agents and could not be held to have been removed by its conversion into money of some other denomination. The last words of S. 3 (1) of the Ordinance "where property other than what was procured by means of an offence has been declared to be liable to attachment" can only refer to cases either when the money or property originally procured by the alleged offender by means of an offence has been spent in acquiring the property which is declared to be attachable or when the money or property originally procured cannot be traced and other property of like value—which would also, in my opinion, cover

[Case No. 75.]

A. I. R. (33) 1946 Lahore 413

ABDUR RAHMAN J.

*Municipal Committee, Hoshiarpur —
Defendant — Appellant*
v.

Darshan Lal—Plaintiff—Respondent.

Second Appeal No. 329 of 1945, Decided on 29th November 1945, from decree of Senior Sub-Judge, Hoshiarpur, D/- 26th October 1944.

Punjab Municipal Act (3 [III] of 1911), Ss. 195 and 195A — Construction of building started without permission — Construction stopped in pursuance of notice under S. 195A — Application to continue construction — No order passed within 60 days — Subsequent completion of building — Sanction must be deemed to have been given — Subsequent notice under S. 195 for demolition of building is invalid.

Where an application for sanction to continue the construction of a building, which was stopped in pursuance of a notice under S. 195A is made to a Municipal Committee but no order is passed thereon within the period of 60 days laid down by S. 193 (4), and the applicant completes the building after the statutory period, the sanction to build must be deemed to have been granted by the Municipal Committee. Any subsequent notice under S. 195 for demolishing the building is invalid as the notice under S. 195 can be issued only where no sanction has been given or is deemed to have been given at the time of the issue of notice. It cannot, in such a case, be contended that the notice was valid with respect to that portion of the building which had been erected without sanction before the date of application for sanction. The reason is that the portion of the building erected by the applicant before the date of application must also be deemed to have been sanctioned. Even if it be taken that the notice was valid in respect of the portion erected before the application, the notice would be invalid, being also in respect of the portion which must be deemed to have been sanctioned. Since it must be held to have been partially invalid, it must be held to have been invalid as a whole. [P 414 C 1, 2]

L. N. Aggarwal — for Appellant.

Prem Chand Pandit — for Respondent.

Judgment.—The facts have been given in detail by both the lower Courts and need not be restated at length. Briefly put, they are that the respondent was served with a notice (Ex. D-1) under S. 195A, Punjab Municipal Act, by the Municipal Committee of Hoshiarpur on 10th December 1942 as the former had started erecting a *tharra* and *Amanchas* on his own land without giving notice of his intention to build. The respondent complied with the notice and discontinued the building operations. He then made an application on 14th December 1942 (Ex. P-7) for the necessary sanction to complete the building which had remained un-

the offender's private money—which he may have even legitimately acquired have been declared to be attachable instead. The obvious intention of this section of the Ordinance was to prevent the mischief from allowing the alleged offender to run away with or to benefit by the money or property procured by him by means of an offence and to prevent the Courts from undoing the harm if he is eventually found guilty and thus depriving him of his illegitimate gains. This intention can best be achieved by construing S. 3 of the Ordinance in the manner in which I have done. Whether the Crown will actually succeed in doing so is more than one can say. But that is a different matter.

[33] The third objection raised on behalf of the petitioners was that inasmuch as no ground was given by the District Judge in his order, he must be held to have had no jurisdiction to issue an *ad interim* attachment. The contention is not well founded as the District Judge is not required by S. 4 (1) of the Ordinance to give any grounds or reasons if he decides to issue the *ad interim* attachment but is only bound to do so if he finds that there were no *prima facie* grounds for believing that the person in respect of whom the application is made has committed any scheduled offence or that he has procured thereby any money or other property. The application under S. 3 (1) for an *ad interim* attachment was accompanied by an affidavit as required by sub-s. (3) of that section and stated the grounds on which the belief that the petitioners had committed the scheduled offences was founded. This was enough. This Court is not entitled in revision to go into the question whether the District Judge was right or wrong in issuing the attachment for he was obviously entitled to do so and no question of jurisdiction being involved, this Court cannot interfere simply because the order was wrong on facts. Let me however not be understood that the order was wrong. I have not considered that aspect of the case as I feel I am precluded from doing so on the revisional side. For the above reasons the petition for revision fails and is dismissed.

Achhru Ram J.—I agree.

D.S./D.H.

Petition dismissed.

finished. No orders were passed on this application for more than two months. The application was, however, rejected by a resolution of the Municipal Committee on 22nd February 1943. Not having received a reply within the time prescribed by law, the respondent completed the *tharra* and the *Amanchas*. The Municipal Committee then served the plaintiff with another notice on 15th March 1943 (Ex. D.4) asking him to demolish the building erected after 13th February 1943. The plaintiff-respondent then instituted the suit, out of which the present appeal arises, for an injunction restraining the Committee from enforcing its notice. He also prayed that the notices issued on behalf of the Committee were illegal and the order of the Committee refusing to grant the sanction was arbitrary, capricious and *ultra vires*. The suit was dismissed by the trial Court but on appeal the Senior Subordinate Judge, Hoshiarpur, decreed the plaintiff's claim. The Municipal Committee has appealed.

[2] It is unnecessary to go into the question whether the order of the Municipal Committee refusing to grant sanction was capricious, arbitrary or *ultra vires* as there is no doubt that the Municipal Committee had no power left to issue a notice under S. 195, Punjab Municipal Act, after a sanction to build was either given by it or is deemed to have been given by the lapse of the statutory period of sixty days fixed by S. 193 (4), Punjab Municipal Act. A notice under S. 195 can only be issued where no sanction has been given or is deemed to have been given at the time of its issue. Learned counsel for the appellant conceded before me that if the sanction had been given expressly the respondent could not have been served with a notice under S. 195 of the Act. He contended, however, that as in the present case no sanction had been expressly granted by the Municipal Committee the power to issue a notice under S. 195 had not ceased to exist. I cannot accept that contention for there is no difference in my opinion between a sanction expressly granted and the sanction which is deemed to have been granted on account of the Municipal Committee's failure to pass any orders on an application to build within the period of sixty days. After the expiry of that period, the application must be deemed to have been sanctioned and once it is found to have been sanctioned either expressly or by operation of law, the Municipal Committee cannot be found to have any power left under

S. 195 of the Act to issue a notice for demolition of the building.

[3] A feeble attempt was made by learned counsel for the appellant to contend that as a certain portion of the building had been erected by the plaintiff-respondent before his application for sanction to build, that portion of the property could be demolished. There is no force in this contention as the application by the plaintiff-respondent was to continue the building which had been partly erected by him before he had made an application. Had this application been sanctioned, it would not only have covered the unerected portion of the building but that portion as well which had been erected before the application. As there is no difference between an express sanction and a sanction which is in law deemed to have been given, the portion erected by the plaintiff before his application must also be deemed to have been sanctioned. In any case, it was not possible to demolish the portions which had been erected prior to the application without demolishing the portion which was erected after the sanction. The notice under S. 195 would be anyhow invalid as it was not only in respect of unsanctioned portion of the building but in respect of a building which must be deemed to have been sanctioned and since it must be held to have been partially invalid, it must be held to have been invalid as a whole. For the above reasons the appeal fails and is dismissed with costs.

K.S./D.H.

Appeal dismissed.

[Case No. 76.]

A. I. R. (33) 1946 Lahore 414

ABDUL RASHID AND MAHAJAN JJ.

Titru Ram — Defendant — Appellant
v.

Mt. Parsinni — Plaintiff —
Respondent.

Second Appeal No. 483 of 1944, Decided on 7th December 1945, from judgment of Beckett J., D/- 12th March 1945.

Custom (Punjab) — Widow in Kangra District can sell land in case of necessity.

In the Kangra District a widow governed by the customary law can sell the lands in case of necessity and her powers are not restricted to temporary alienation: (41) 28 A. I. R. 1941 P. C. 21; (23) 9 A. I. R. 1922 Lah. 217 ; 72 P. R. 1906 and 60 P. R. 1910, *Ref.* [P 415 C 1; P 416 C 1]

D. K. Mahajan — for Appellant.

Harbans Singh — for Respondent.

Abdul Rashid J. — This second appeal has been referred to a Division Bench for

disposal by a learned Single Judge of this Court. The only question for determination is whether in the Kangra District a widow governed by customary law can sell land in case of necessity or whether her powers are limited to temporary alienation. The learned Judge has referred this case to a Division Bench as he considered that there was some conflict in the answer to question 45 of the present *riwaj-i-am* and the answers given to questions 2 and 3 in the *riwaj-i-am* of 1868. The general custom with respect to the powers of alienation possessed by the widow under the customary law are stated in Para. 62 of Rattigan's Digest of Customary Law. It has been laid down in this paragraph that every person having an interest in property whether absolute or as life tenant (e. g., a widow, a daughter or a mother) can sell or mortgage such property for a necessary purpose. In view of the observations of their Lordships of the Privy Council in I. L. R. (1941) Lah. 154¹ we start with the initial presumption that under customary law a widow has a power to sell the property in her possession for necessary purposes. It appears that the *riwaj-i-am* of 1868 relating to the Kangra District printed at page 173 of the present Manual was in accordance with the general custom as enunciated in Rattigan's Digest of Customary Law. Questions 2 and 3 were in the following terms:

"Question 2. Can a widow alienate by gift or by will?"

Answer. In the presence of her husband's collaterals she can only do so with their consent. If there are no such collaterals she can do so without restraint.

Question 3. Can a widow alienate by sale or mortgage?"

Answer. She can do so for personal and proper necessity such as paying debts left by husband, marriage of daughter, maintenance of children, and paying Government dues. She must first offer to alienate to her husband's collaterals and can only alienate to others on their refusing."

A note was added to this answer to the following effect: "This question is also covered by question 45 of this volume. There is no change in this custom." When we turn to question 45 of the present *riwaj-i-am*, we find the following answer:

"Answer 45. The widow succeeds to a limited life interest in the estate only. There is no restriction on her power to alienate moveable property. She can, however, only alienate ancestral immovable property, or immovable property acquired by her husband, temporarily and for legal necessity, i. e., for payment of her husband's just debts, or

Government revenue, to defray the expenses of her daughter's marriage or family or for any other special and sufficient reason. She has, however, no power to effect a permanent alienation. No distinction is drawn between ancestral property and property acquired by her deceased husband. The widow making an alienation should first offer to do so to the collaterals and only on their refusal should she alienate to a stranger."

It appears to me to be fairly obvious that by combining questions 2 and 3 and recording a consolidated answer in the present *riwaj-i-am* a great deal of confusion has been created. The note to the previous *riwaj-i-am* printed at page 174 of the present Manual, however, shows that with respect to the custom recorded in answer to question 45 there had been no change between the previous *riwaj-i-am* and the present *riwaj-i-am*. In the present *riwaj-i-am* there are a number of instances showing that a widow possesses the same powers of alienation in the Kangra District as in the rest of the province. Mt. Jamna, a Brahmin widow, sold and mortgaged land. As there was valid necessity the alienation was upheld by the Munsif of Nurpur by his judgment, dated 23rd November 1910. At page 76 of the Customary Law it is stated that it was held by the Chief Court in Civil Appeal No. 913 of 1891 that a Rathi widow of the Kangra District could not alienate her husband's property without a valid necessity. This is in accordance with the general custom of the Punjab. To the same effect are instances of *mauzas* Repur and Dhira given at page 78 of the Customary Law. At page 79 it is stated that Mt. Ambo, widow of Chhando Rajput, sold land to Khazana. It appears that this alienation was never contested. Mt. Jassodhan, a Ghirth widow of *mauza* Guler sold some land. The reversioners sued to contest the alienation. The Divisional Judge upheld the sale as it was for necessity. The judgment was given on 9th March 1905. The Munsif of Kangra by his judgment, dated 5th July 1908, upheld an alienation by Mt. Parbati, a Ghirth widow, as the alienation was made to defray the expenses of her marriage. A number of other instances of similar nature are mentioned at pages 80 and 81 of the Customary Law. There is not a single instance given in this Customary law where an alienation made for a necessary purpose by a widow was set aside or converted into a mortgage. In these circumstances it seems to me that the answer to question 45 in Mr. Middleton's Customary Law of the Kangra District does not record the custom correctly. The

1. (41) 28 A. I. R. 1941 P. C. 21 : I. L. R. (1941) Lah. 154 : I. L. R. (1941) Kar. P. C. 22 : 68 I. A. 1 : 193 I. C. 436 (P. C.), Mt. Subhani v. Nawab.

powers of a widow in the Kangra District seem to me to be the same as the powers of a widow in the rest of the province.

It was held in 5 Lah. 450² that the estate of a widow under Customary law is subject to the same restrictions as that of a widow under Hindu law. This case related to the Girths of the Kangra District. It is evident that under the Hindu law a widow has the right to alienate the property of her husband for a necessary purpose. Reference may also be made to 72 P. R. 1906³ and 60 P. R. 1910⁴ which show that the powers of females in the Kangra District are not in any way different from the powers possessed by the females governed by Customary law in the other districts of this province. It has been held by the lower Courts that the alienation made by the widow in the present case was for necessity. In these circumstances, there was no justification at all to convert the sale into a mortgage. For the reasons given above, I would accept this appeal, set aside the judgments and the decrees of the Courts below and dismiss the plaintiff's suit with costs throughout.

Mahajan J. — I agree.

N.S./D.H.

Appeal accepted.

2. ('22) 9 A. I. R. 1922 Lah. 217 : 5 Lah. 450:74 I. C. 644, Gobinda v. Nandu.
3. ('06) 72 P. R. 1906, Lahori v. Radho.
4. ('10) 60 P. R. 1910 : 7 I. C. 470, Kokan v. Lakhoor.

[Case No. 77.]

A. I. R. (33) 1946 Lahore 416

TEJA SINGH J.

Kishan Singh and another —

Defendants — Appellants
v.

Mt. Harnam Kaur — Plaintiff

— Respondent.

Second Appeal No. 604 of 1945, Decided on 15th January 1946, from order of Sub-Judge, Ferozepore, D/- 9th December 1944.

Limitation Act (1908), Art. 181—Application for restitution—Limitation—Starting point — *M* obtaining possession in execution of decree for possession—Decree for possession reversed on 15th February 1940 and suit remanded — Suit dismissed on 28th March 1940 — *M*'s first appeal against decree dismissing suit, dismissed on 9th July 1940 and second appeal dismissed on 27th May 1941—Application by defendant for restitution and possession filed on 19th January 1944 held time-barred.

One *M* brought a suit for possession of land against the defendant and obtained a decree on 31st August 1939. She obtained possession of the land in execution on 27th November 1939. The defendant appealed to the District Judge, who set aside the decree of the trial Court and remanded

the case for retrial on 15th February 1940. The trial Court, after the remand, dismissed the suit on 28th March 1940. *M*'s appeal to the District Judge was dismissed on 9th July 1940 and her second appeal to the High Court was dismissed on 27th May 1941. The defendant applied for restitution and the delivery of possession of the land back to him on 19th January 1944 :

Held that immediately on the passing of the order by the District Judge on 15th February 1940 setting aside the decree passed in *M*'s favour the defendant became entitled to restitution. In any case the right accrued to the defendant on 28th March 1940, when the suit was dismissed by the trial Court and the decree previously passed in *M*'s favour ceased to exist. The application was therefore time-barred : ('39) 26 A. I. R. 1939 Lah. 73, *Foll* ; ('26) 13 A.I.R. 1926 Cal. 981, *Not foll.* ; ('28) 15 A.I.R. 1928 Pat. 598, *Disting.* ; ('23) 10 A.I.R. 1923 Cal. 389, *Ref.* [P 417 C 1 ; P 418 C 1]

Limitation Act —

('42) Chitaley, Art. 181, N. 7, Pt. 7.

('38) Rustomjee, Page 1662.

D. R. Prem — for Appellants.

Judgment. — In order to be able to appreciate the question of law involved in this appeal it is necessary to give briefly the facts. One Mt. Harnam Kaur brought a suit for possession of land against the defendants and obtained a decree on 31st August 1939. She obtained possession of the land in execution on 27th November 1939. The defendants appealed to the District Judge, who set aside the decree of the trial Court and remanded the case for retrial on 15th February 1940. The trial Court after the remand dismissed the suit on 28th March 1940. Mt. Harnam Kaur's appeal to the District Judge was dismissed on 9th July 1940 and her second appeal to this Court was dismissed on 27th May 1941. The defendants applied for restitution and the delivery of possession of the land back to them on 19th January 1944. Mt. Harnam Kaur opposed the application on the ground that it was barred by time. The executing Court overruled her objection and holding that the application was within time issued a warrant for possession. On appeal the Senior Sub-Judge set aside the order of the executing Court and held that the application was barred. This order is the subject-matter of appeal before me.

[2] Unfortunately the respondents did not appear to oppose the application, but I have heard Mr. D. R. Prem, learned counsel for the appellants, and have gone through the various authorities that bear on the point. It is conceded that the application comes within the purview of S. 144, Civil P. C., and that so far as limitation is concerned it is governed by Art. 181, Limitation Act. That article lays down that the period

of limitation for an application is three years and the time starts when the right to apply accrues. Section 144, Civil P. C., is to the effect that where and in so far as a decree is varied or reversed, the Court of first instance shall on the application of any party entitled to any benefit by way of restitution or otherwise, cause such restitution to be made as will place the parties in the position which they would have occupied but for such decree. In the present case the decree passed in Mt. Harnam Kaur's favour was set aside by the order of the District Judge on 15th February 1940, and my opinion is that immediately on the passing of that order the defendants became entitled to restitution. In any case the right accrued to the defendants on 28th March 1940, when the suit was dismissed by the trial Court and the decree previously passed in Mt. Harnam Kaur's favour ceased to exist. Mr. D. R. Prem, however, contended that in view of the fact that Mt. Harnam Kaur appealed first to the District Judge and then to the High Court the time started to run only from the date of the decree of the High Court, which was the final decree in the case. In support of his contention, the learned counsel relied upon A.I.R. 1928 Pat. 598¹ and A.I.R. 1926 Cal. 981.² The facts of the Patna case were slightly different and the application which was the subject-matter of consideration by the High Court, was one for restitution of mesne profits. One party contended that the *terminus a quo* was the date on which the decree under which the plaintiff had obtained the possession was set aside and the right accrued to the defendant to get back the property from the plaintiff. The other side contested this proposition and at the same time urged that the time from which the defendant's right to recover mesne profits accrued was the date on which they had got back the land from the other side. The learned Judges of the High Court found both the points in favour of the defendant, but with all deference their observations that time for restitution of the possession of the land also started to run from the date of the final decree of the High Court are of the nature of an *obiter dictum*. This is clear from the following remarks made by Kulwant Sahay J:

[3] "Even assuming that the right to apply accrued on the passing of the decree by the first

1. (28) 15 A. I. R. 1928 Pat. 598 : 7 Pat. 794 : 114 I. C. 476, Rambu Jhawan v. Bankey Thakur.
2. (26) 13 A. I. R. 1926 Cal. 981 : 92 I. C. 960, Fazalar Rahaman v. Abdul Samad.

appellate Court *viz.*, 26th April 1922, I am of opinion that the right to apply for ascertainment of mesne profits did not accrue until after the delivery of possession to the defendant which took place in September or October 1925. The period for which mesne profits were to be ascertained could only be determined after the delivery of possession."

[4] The facts of the Calcutta case are more similar to those of the present case and it was held that where a decree is reversed by the first appellate Court and the High Court in second appeal affirmed the order reversing the decree, time to apply for restitution begins from the date of the High Court's order and not from the first appellate Court's order. But the learned Judges did not give any reasons in support of their decision. They merely relied upon A. I. R. 1923 Cal. 389³ in which the question was, what is the period of limitation for an application for a final decree and it was held that when a preliminary decree in a mortgage suit has been affirmed on appeal, an application made within three years of the date of the affirmance with a view to make a final decree is within the period prescribed under Art. 181. I may respectfully point out that the application for a final decree stands altogether on a different footing from an application for restitution under S. 144 and the principles governing the first can in no case apply to the second. The matter is covered by the authority of this Court in A. I. R. 1939 Lah. 73⁴ decided by a Division Bench consisting of Addison and Abdul Rashid JJ. A decree had been passed in favour of the plaintiffs against the Punjab National Bank, Delhi, by the trial Court. On appeal to the High Court, the decree was reversed and the plaintiffs' suit was dismissed. The plaintiffs preferred an appeal to the Privy Council which was also dismissed. Before the decision of the appeal by the High Court the plaintiffs took out execution of their decree and recovered the decretal amount from the Bank. After the decision of this Court, the Bank applied for restitution of the amount recovered from it. The application was made within three years of the date of the final decision of the Privy Council, but beyond three years from the date of the decree of the High Court. It was held that the application was barred by time. This is what the learned Judges said:

3. (23) 10 A. I. R. 1923 Cal. 389 : 75 I. C. 2, Uma Charan v. Nibaran Chandra.

4. (39) 26 A. I. R. 1939 Lah. 73 : I. L. R. (1938) Lah. 571 : 181 I. C. 119, Punjab National Bank Ltd. v. Nanhemal Jankidas.

"The learned counsel for the appellant contended that the present application for restitution was within time, even under Art. 181, Limitation Act, owing to the fact that the other party had appealed to His Majesty in Council and the right to apply accrued to the appellant on the date when the appeal was dismissed by the Judicial Committee. It was urged that as the decree of the final Appellate Court is the principal decree in the case it is only that decree which can be executed. . . . We are of opinion that this contention is without force. The law allows a successful party to execute the decree as soon as it has been obtained in the Court of first instance. Similarly, the party who has succeeded in the first appellate Court is entitled to apply for restitution without waiting for the decision of any second appeal that may be preferred by the other party."

[3] I respectfully agree with these observations and my opinion is that time for restitution of application in this case started at least from 28th March 1940, if not from 15th February 1940. As a last resort, Mr. Prem contended that when Mt. Harnam Kaur preferred her appeal to this Court the learned Judge, who admitted it, stayed proceedings relating to restitution of the decree by his order dated 31st October 1940 and since this order remained in force till 27th May 1941, when the appeal was finally disposed of, all this time should be deducted while counting the period of limitation. In my opinion the contention is without force, because the order was that execution proceedings be stayed, and since Mt. Harnam Kaur had already taken possession of the land there was nothing for her to execute. But assuming that what the learned Judge intended to stay were the proceedings relating to restitution, the defendants would only be entitled to a deduction of six months and twenty-six days and taking even this time into consideration their application was still barred by time. The result is that the appeal fails and is dismissed. In view of the fact that the respondents did not appear to oppose the appeal there will be no order as to costs.

H.S./D.H.

Appeal dismissed.

[Case No. 78.]

A. I. R. (33) 1946 Lahore 418

ABDUR RAHMAN J.

Basau Mall Chet Ram — Petitioner
v.

Sri Mandi Dabwali Bros. Ltd. —

Respondent.

Civil Revn. No. 286 of 1945, Decided on 5th December 1945, from order of Senior Sub-Judge, Hissar, D/- 20th December 1944.

(a) Punjab Relief of Indebtedness Act (7 [VII] of 1934), Ss. 13 and 14—Failure to pub-

lish notice under S. 13 (1)—Creditor not complying with provisions of S. 13 (3)—Creditor's debts cannot be deemed to be discharged.

Where a Debt Conciliation Board fails to publish a notice as required by S. 13 (1) the provisions of S. 14 (1) are not attracted and the consequence of discharge of debts mentioned in S. 13 (3) does not follow. Similarly, if the Board fixes no date or dates of hearing after a creditor has been called upon to submit a statement of debts under S. 13 (1) his failure to appear before the Board cannot be penalised by discharge of his debts as he was under no duty to appear on any particular date: ('45) 32 A.I.R. 1945 Lah. 309 (F. B.), *Rel. on.*

[P 419 C 1]

(b) Punjab Relief of Indebtedness Act (7 [VII] of 1934), S. 13 (4) — Order of civil Court granting application for revival of debt—Revision—Objection that Board had not ceased to exist at time of application cannot be entertained for first time—Civil P. C. (1908), S. 115.

Where an application by a creditor under S. 13 (4) for revival of his debts is granted by a civil Court without any objection by the debtor, the debtor cannot, in revision against the order, object for the first time that the civil Court was incompetent to entertain the application as the Debt Conciliation Board which was competent to hear such application had not ceased to exist at the time of the application. — [P 419 C 1]

(c) Punjab Relief of Indebtedness Act (7 [VII] of 1934), S. 13 (4) — Application for revival of debt can be made to any civil Court having jurisdiction.

An application under S. 13 (4) by a creditor for reviving his debts may be made to any civil Court having jurisdiction and not necessarily to the District Judge who is the principal civil Court of original jurisdiction. [P 419 C 2]

Sardar Partap Singh and Bhagat Singh Chawla — for Petitioner.

C. L. Aggarwal — for Respondent.

Order.—These are 12 connected petitions for revision against a consolidated order passed by the Senior Subordinate Judge, Hissar, reviving certain debts due to Shri-mandi Dabwali Brothers Ltd., in liquidation, on the ground that no notice had been published by the Debt Conciliation Board as required by S. 13 (1), Punjab Relief of Indebtedness Act, and that no notice under that section was sent to the respondent by registered post as required by the rules framed by the Local Government.

[2] Learned counsel for the petitioner contends in the first instance that in order to attract the provisions of sub-cl. (3) of S. 13 of the Act it is unnecessary to refer to sub-cl. (1) or (2) and that a debt may be wiped off on account of a creditor's failure to comply with the requirements contained in sub-cl. (3), even if a Debt Conciliation Board has omitted to issue a notice under sub-cl. (1) of that section. The contention is in my opinion devoid of any force and must be repealed. On the date fixed under S. 13 (1)

of the Act and after a notice has been sent to creditors under sub-cl. (2) of that section the Board is required by S. 13 (1) to publish a notice calling upon every creditor to submit a statement of debts owed to him within two months from the date of publication of the notice. If no notice is published, the provisions of S. 14 (1) of the Act which specifically refers to it cannot be attracted and the consequences mentioned in S. 13 (3) cannot follow. Similarly, if no date or dates of hearings are fixed by the Board after every creditor has been called upon to submit a statement of debts under S. 13 (1) of the Act, his failure to appear cannot be penalised for the obvious reason that he was under no duty to appear on any particular date.

[3] My attention has been drawn in this connection to a Full Bench decision of this Court in 47 P. L. R. 399¹ which holds that the penalty of discharge prescribed by S. 13 (3) cannot come into operation for a creditor's failure to appear before the Board before the date on which accounts had to be produced by him in pursuance of the notice served on him under sub-cl. (1) of that section. This settles the matter although learned counsel for the petitioner tried to distinguish it on the ground that the Full Bench was deciding in regard to the first hearing only and not in regard to subsequent hearings. This is not correct as on principle there is no difference between the first hearing and the subsequent hearings particularly when the words in S. 13 (3) refer to the creditor's absence "at any of the hearings fixed by the Board." It was next contended that the Court below had no jurisdiction to revive the debts firstly because there was no proof on the record that the Debt Conciliation Board had ceased to exist and secondly because the application should have been made to the District Judge only. The first of these objections was not raised before the trial Court and I cannot permit the petitioners to raise it here for the first time. Had the Debt Conciliation Board been in existence and vested with jurisdiction to entertain the applications made on behalf of the respondent, it is highly improbable that the objection as to the civil Court's competency to hear these applications would not have been raised on behalf of the petitioners who were duly represented by counsel. Civil Courts have been invested

with certain powers under S. 13 (4) of the Act only when no Board is vested with jurisdiction to exercise them.

[4] As to the second contention sub-cl. (4) of S. 13 does not say that the application has to be made to the principal civil Court of original jurisdiction. On the contrary it says that a creditor who has to make an application under sub-cl. (4) has to satisfy either the Board or "a civil Court" in case the Board is not invested with jurisdiction to hear and dispose of it. This obviously means any civil Court before which the point has been raised. As the Court of the Senior Subordinate Judge is one of the civil Courts it had jurisdiction to revive the debt. For the above reasons all the revision petitions fail and are dismissed with costs. Costs of counsel to be assessed in one case.

K.S./D.H.

Revisions dismissed.

[Case No. 79.]

A. I. R. (33) 1946 Lahore 419

ABDUR RAHMAN AND MAHAJAN JJ.

Mt. Kanta Devi — Plaintiff

— Appellant

v.

Sm. Kalawati and others —

Defendants — Respondents.

First Appeal No. 182 of 1943, Decided on 23rd January 1946, from decree of Commercial Sub-Judge, 1st Class, Delhi, D/- 6th July 1943.

(a) Civil P. C. (1908), S. 11—Division Bench merely expressing its opinion on abstract question of law—Such opinion has no binding effect on another Division Bench—Opinion cannot be held to be *res judicata* between parties.

A Division Bench cannot merely express its opinion on an abstract question of law detached from the facts of the case which it is called upon to decide. That is the province of a Full Bench when a point is referred to it for opinion. Detached from the facts of the case, the opinion of a Division Bench on a pure question of law cannot have the same binding effect on another Division Bench as the decision of a Full Bench would have, although it is improper for a Division Bench to dissent from the opinion of another Division Bench. [P 422 C 2; P 423 C 1, 2]

A Division Bench, without adjudicating on the case, merely expressed an opinion as to what was the law on the subject, and left that opinion to be applied by the trying Judge who happened to be a Subordinate Judge. In view of the opinion expressed by the Division Bench, the Subordinate Judge dismissed the suit. The plaintiff appealed to the High Court and the appeal came to be heard before a Division Bench. In the meanwhile, a Full Bench gave its opinion on the same subject contrary to the opinion expressed by the previous Division Bench expressly dissenting from that opinion :

Held, that the decision of the Division Bench could not be held to be *res judicata* between the

1. (45) 32 A.I.R. 1945 Lah. 309 : 222 I. C. 295 : 47 P. L. R. 339 (F.B.), Thambu v. Bhartu.

parties to the litigation as it was not its final decision on the facts of the case. Even if the Division Bench was competent to express its opinion without applying it to the facts of the case, it was not that decision but the decision which applied that law to the facts of the case which could debar a Court from rehearing the question that had been heard and finally decided and as that decision which applied the law was under appeal, it could not be held to be *res judicata*. [P 423 C 1,2]

C. P. C. —

(44) Chitaley, S. 11, Notes 11 and 100.

(41) Mulla, P. 58, Note "Issue of law" and P. 79, Note "Heard and finally decided."

(b) Civil P. C. (1908), O. 6, R. 17 — Amendment of pleadings — Amendment introducing plea of fraud for first time — Amendment will not be permitted.

Courts are not only reluctant but averse to permitting a party to amend his pleadings to substitute a new and a distinct kind of fraud, what to say of introducing a plea of fraud for the first time when it had never been pleaded before.

[P 422 C 1]

C. P. C. —

(44) Chitaley, O. 6, R. 17, N. 8, Pts. 1, 3.

(41) Mulla, P. 600, Pt. (y).

Dev Raj Sawhney and Ram Kishen Janeja
— for Appellant.

F. C. Mittal (for O. R.), Bishen Narain (for Respondents 1, 2 and 4), Bashir Ahmed (for O. R.) and Tek Chand for creditors and S. Narinder Singh (for Respondent No. 11)
— for Respondents.

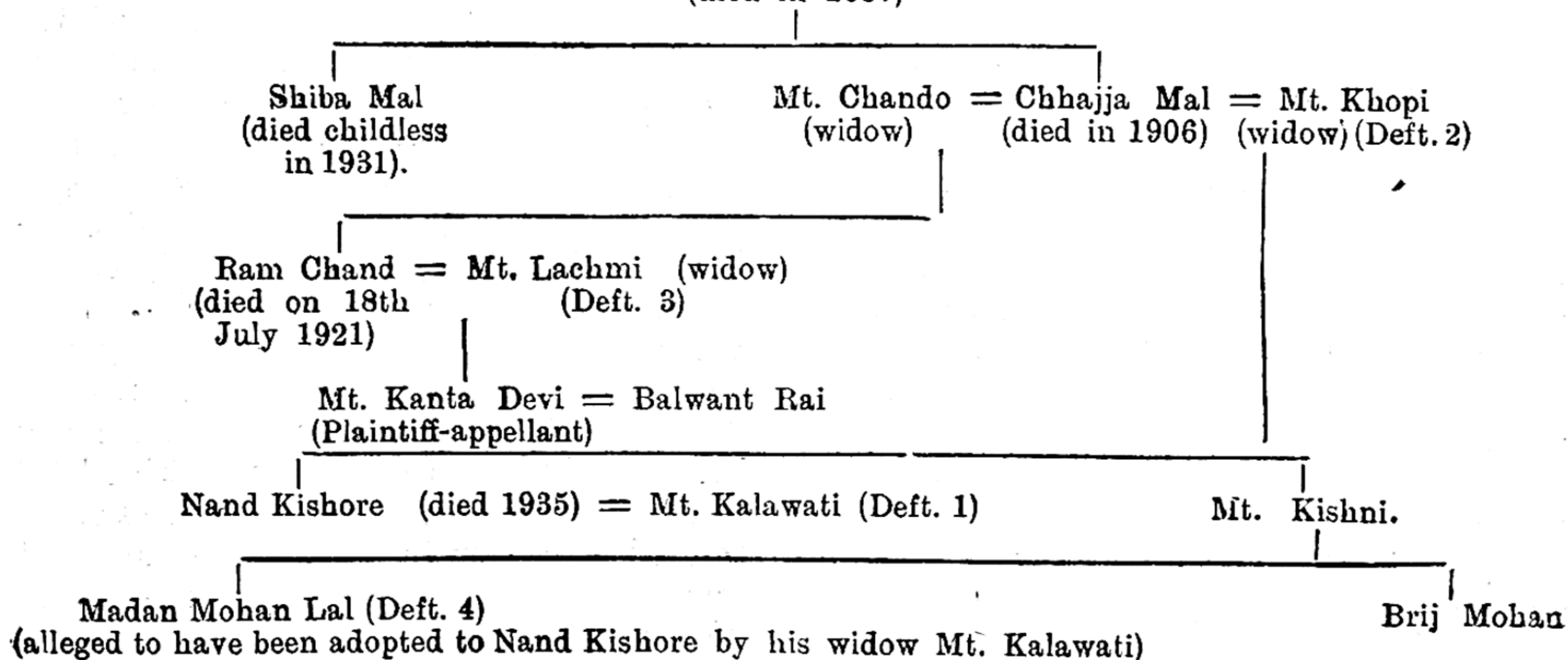
Abdur Rahman J. — (*For pedigree, see page 421.*) A suit was instituted by Mt. Kanta Devi minor through her husband as her next friend in the Court of a Subordinate Judge at Delhi (Suit No. 69 of 1935) on 9th May 1935 against Mt. Kalawati (defendant 1), Mt. Khopi (defendant 2), Mt. Lachhmi (defendant 3), Madan Mohan Lal (defendant 4) and others for a declaration that she was the daughter of Ram Chand and would be, after the death of her mother Mt. Lachhmi, entitled to succeed to the joint properties either left by her father at the time of his death or acquired subsequently out of the joint funds. No declaration to the effect that Madan Mohan Lal (defendant 4) had not been adopted by his widow Mt. Kalawati to her husband Nand Kishore was asked for in the plaint; but its validity was expressly challenged in para. 18 of the plaint and the declaration that she would be entitled to succeed to her father's property after her mother's death may incidentally cover the point that Madan Mohan Lal had not been validly adopted to Nand Kishore. Issues were framed in this case on 30th January 1936. The suit dragged on for some time as I find from the record that it was to come up before the trial

Court on 16th August 1937 presumably for recording evidence. No evidence was, however, recorded on that date but a compromise (Ex. A) printed at pages 48 and 49 of the paper book was put in. As the plaintiff and defendant 4 were minors, applications were presented under O. 32, R. 7, Civil P. C., by the next friend of the former and the guardian ad litem of the latter for leave to enter into the compromise on behalf of the minors. These were adjourned by the Subordinate Judge to 24th August 1937 and leave was granted by him to enter into the compromise on 24th August 1937 as he was of the view that it was for the benefit of the minors. A commissioner was then appointed to record the statements of the ladies who had signed the compromise. Their statements as also the statement of Balwant Rai were recorded by the Commissioner on 26th August 1937. These must have been presented to the Court on the following day when a decree was passed by it in terms of the compromise. The decree is printed at pp. 53 and 55 of the record.

[2] Another suit was filed by Mt. Lachhmi (Suit No. 59 of 1936) on 27th February 1936 for the administration of Nand Kishore's estate. This was pending in the Court of another Subordinate Judge at Delhi and was also compromised. Mt. Kanta Devi does not seem to have been impleaded as a defendant in this suit. A decree in that suit was passed on 30th August 1937. It is printed at pp. 44 to 46 of the printed record. According to para. 9 of the decree Mt. Kanta Devi was to succeed to the property which had fallen to her mother's share. Balwant Rai was to be one of the joint reversioners.

[3] On attaining majority Mt. Kanta Devi brought a suit, out of which the present appeal arises, on 11th May 1940 in the Court of the Subordinate Judge at Delhi for a declaration that the compromises entered into the above-mentioned suits (Nos. 69 of 1935 and 59 of 1936) were not binding on her and that the whole of the estate left by Ram Chand at the time of his death and the property subsequently acquired out of that estate was inherited by Mt. Lachhmi who was not bound by the debts incurred by Shiba Mal and Nand Kishore. She had also asked for other reliefs but it is unnecessary to state them.

[4] It was alleged in para. 22 of this plaint that the plaintiff's husband who was acting as a next friend on her behalf had acted with gross negligence and carelessness in entering into the compromise in



suit No. 69 of 1935 and in agreeing to be bound by the debts, a list of which was annexed in suit No. 59 of 1936. The compromise was also alleged to be prejudicial to the plaintiff for reasons given in para. 24 of the plaint. It was also stated in para. 23 that "the Court in sanctioning the compromise under O. 32, R. 7, Civil P. C., did not appreciate the facts of the case or their consequences to the minor plaintiff and allowed the compromise as a mere matter of course." This suit was transferred to this Court in consequence of an order passed by this Court on 8th November 1940. Monroe J. before whom it came up for hearing, framed the two following preliminary issues: (1) Is the court-fee sufficient? (2) Are the allegations of negligence on the part of the guardian *ad litem* sufficient basis for setting aside the compromise?

[5] He decided the first issue in favour of the plaintiff but the question covered by issue 2 was referred by him to a larger Bench with the following remarks:

[6] "The question involved is an important one, particularly important in the present case because should it eventually be held that the allegations of negligence are insufficient, a very long and involved trial with the attendant expense will be avoided."

[7] The case was heard by a Division Bench composed of Sir Douglas Young C. J. and Beckett J. It was held by them (*vide* I. L. R. (1943) Lah. 113¹) that the negligence of a guardian *ad litem* was not, in itself, a ground for setting aside a consent decree against a minor, which could only be set aside on the ground of fraud, actual or constructive. It must, however, be observed

that the Division Bench refused to adjudicate on the case itself and confined itself to the decision of the abstract question of law as to whether the allegations of negligence on the part of a guardian *ad litem* or of a next friend could *per se* and without any allegation of fraud form a sufficient basis for the purpose of getting rid of a compromise, and of the decree based thereon. When the learned Chief Justice and the learned Judge were asked to apply the law to the pleadings in the suit and to say whether the case could proceed or not, they refused so to do. They observed at p. 121 as follows:

[8] "That this is the correct position in regard to a consent decree against a minor is not seriously disputed by either side in the present case, but we have been asked to apply the law to the pleadings in the suit and to say whether the case should now proceed or not. In the ordinary way, it is for the trial Judge to apply the law to the facts set out in the pleadings; and since it is only the legal question in its general form which has been referred to us, we see no reason for departing from the usual practice. The question referred will accordingly be answered by saying that negligence of a guardian *ad litem* is not in itself a ground for setting aside a consent decree against a minor, which can only be set aside on the ground of fraud, actual or constructive."

[9] With that decision the proceedings were returned to the referring Judge, i. e., to Monroe J. for further action. An application was then made to the learned Judge on behalf of the appellant to permit her to put in a better statement. Monroe J. did not accede to that prayer and ordered the appellant to make an application for leave to amend her plaint. An application was consequently made on 31st March 1942, which is printed at pp. 26 to 29 of the printed record, in which she asked for leave to add allegations in regard to fraud alleged

1. ('42) 29 A. I. R. 1942 Lah. 205 : I. L. R. (1943) Lah. 113 : 201 I. C. 671, Mt. Kanta Devi v. Kalawati.

to have been committed by her husband who was acting as her next friend in the previous litigation. A copy of the proposed plaint was also put in along with this petition. It is printed at pp. 29 to 38 of the record. It could not be taken up and disposed of by Monroe J. The suit then came up before Muhammad Munir J. on 25th March 1943. He refused to decide it or to consider the application for leave to amend the plaint but finding no reason why the suit should be heard on the extraordinary Original Side of this Court re-transferred it to the Subordinate Judge at Delhi. It was, however, ordered that the application for leave to amend should be disposed of before the suit is tried on the merits and decided.

[10] The case came up before Mr. Tara Chand Aggarwal, a Subordinate Judge at Delhi, who, in pursuance of the orders passed by this Court, took up the application for leave to amend. But after hearing learned counsel for the parties he refused to grant leave as he did not find any strong or exceptional circumstances to be in existence which alone could have entitled a plaintiff to permit a plea of fraud to be added when it had not been alleged by her at the time when the plaint was put in on her behalf. No exception can be taken to this decision as the Courts are not only reluctant but averse to permitting a party to amend his pleading to substitute a new and a distinct kind of fraud, what to say of introducing a plea of fraud for the first time when it had never been pleaded before. And in view of the opinion expressed by the Division Bench in I.L.R. (1943) Lah. 113,¹ by which he naturally considered himself to be bound, the learned Subordinate Judge dismissed the suit, for the plaintiff had attacked the compromise mainly, although, not solely, on the ground of her next friend's negligence and this alone, according to the view of the Division Bench of this Court, could not have furnished a good cause of action to the plaintiff. Aggrieved by this decision the plaintiff has preferred the present appeal.

[11] In the meantime, however, the question "whether a minor can avoid a decree passed against him on the ground of gross negligence on the part of his guardian *ad litem*, even if he has not succeeded in proving fraud or collusion on the part of such guardian" came up for decision before a Full Bench of this Court (see Regular Second Appeal No. 562 of 1943)² and the

learned Judges were unanimously of the view that it was not necessary to allege or prove fraud in order to enable a person to get rid of a decree passed against him during his minority and that gross negligence by his next friend or guardian *ad litem* would alone, if established, entitle him to avoid a decree if found to have been passed in consequence of that negligence. The leading judgment was delivered by Abdul Rashid J. and what fell from my brother Mahajan in concurring with Abdul Rashid J. may be referred to with advantage. The decision in I.L.R. (1943) Lah. 113,¹ it may be added, was expressly referred to and dissented from.

[12] When this appeal came up before us yesterday, I was of the view that although the decision given by the Division Bench in I.L.R. (1943) Lah. 113¹ was not correct, yet it would be binding on the parties to this suit on the principles of *res judicata* — S. 11, Civil P. C., not being exhaustive—for the question had been heard and finally decided by this Court in this suit and the fact that the decision was erroneous in law would be immaterial. It was not then realised that the abstract question of law was alone decided by the Division Bench and that instead of applying to the facts of the case, the task was left to be performed by the referring Judge. I have already referred to the circumstances under which the matter was left undecided by a learned Judge on the extraordinary Original Side of this Court and was determined for the first time by the Subordinate Judge at Delhi, by his judgment now under appeal. It might be added that it would have made no difference in my view if the decision by the Division Bench in I.L.R. (1943) Lah. 113¹ had been applied for the first time by a learned Single Judge of this Court. The only difference in that case would have been that the appeal to this Court would have been preferred under the Letters Patent and not under the Punjab Courts Act.

[13] The real questions that arise for determination at this stage is whether the learned Judges of the Division Bench were competent to decide the abstract question of law without applying their decision to the facts of the case? And even if they were competent so to do, can their opinion be held to be *res judicata* between the parties to the present litigation?

[14] A Division Bench cannot, first of all, in my view, merely express its opinion on an abstract question of law detached from the

2. Reported in ('46) 33 A.I.R. 1946 Lah. 233 (F.B.), Iftkhar Hussain Khan v. Beant Singh.

facts of the case which it is called upon to decide. That is, I think, the province of a Full Bench when a point is referred to it for opinion. I am aware of the fact that the referring Judge had in this case referred an abstract question of law for decision. But it should have been placed before a Full Bench and not before a Division Bench both because strictly speaking it falls in my view within the legitimate scope of a Full Bench to decide abstract questions of law and because, in view of conflict of judicial opinion amongst the High Courts on the point, the decision should have been given so as to be binding on the other Division Benches of this Court. In any case the present contention advanced on behalf of the appellant cannot be held to be barred by the principles of *res judicata*. If I were to hold otherwise, the result would be startling. This case itself furnishes a very good illustration. Since the Division Bench did not adjudicate on the case and merely expressed an opinion as to what was the law on the subject, and left that opinion to be applied by the trying Judge, who happens to be a Subordinate Judge in the present case, his decision would be, if I were to accept the respondent's contention, *res judicata* between the parties and would debar this Division Bench from considering its correctness although it has been appealed from. If I were to hold that we were prevented by the principles of *res judicata* from deciding this case, it would be not on account of the decision by the Division Bench in I. L. R. (1943) Lah. 113¹ but on account of the decision of the Subordinate Judge although it must be admitted that in deciding the matter he had applied the opinion expressed by the Division Bench. But would not his decision have been open to attack if he had applied the decision of another Division Bench given in a case between different parties altogether if we found that the law laid down by the Division Bench in that case was erroneous and was subsequently overruled by a Full Bench of this Court? If, therefore, I am even mistaken in thinking that the determination of a purely legal question falls within the legitimate scope of a Full Bench and not that of a Division Bench, I do not think I would be wrong in holding that the decision by the Subordinate Judge could not be in the present case held to be final or to constitute *res judicata* between the parties. Had the decision been given by the Division Bench on the facts of the case, it could not

have been open to appeal to this Court, but would have been so if it had been given by a learned Single Judge of this Court or by any Subordinate Court of this Province. That is why, if for no other reason, the decision by the Division Bench should not have been on an abstract question of law but on the facts of the case which had been referred to it. It would not have been then possible for us to question the correctness of that decision. But detached from the facts of the case, the opinion of a Division Bench on a pure question of law could not have the same binding effect on us as the decision of a Full Bench would have had although I must concede for obvious reasons that it is improper for a Division Bench to dissent from the opinion of another Division Bench. At all events, even if the Division Bench in I. L. R. (1943) Lah. 113¹ was competent to express its opinion without applying it to the facts of the case, it is not that decision but the decision which applied that law to the facts of this particular case which could debar a Court from re-hearing the question that had been heard and finally decided and as that decision which applied the law is at present under appeal, it cannot be held to be *res judicata*. The decision of the Division Bench in I. L. R. (1943) Lah. 113¹ cannot be held to be *res judicata* as it was not its final decision on the facts of this case. And as the view of the law expressed by it has been dissented from by the Full Bench in R. S. A. No. 563 of 1943,² it can no longer be accepted.

[15] For the above reasons the judgment under appeal cannot be upheld and must be set aside. In view of the decision of the Full Bench, the application made on behalf of the plaintiff to amend the plaint and to allege fraud has also become unnecessary. The plaintiff had in view of the decision of the Full Bench made quite sufficient allegations to entitle her to bring a suit. Whether she would be able to substantiate those allegations is a different matter but that is a question on the merits and will have to be decided by the trial Court after evidence has been led on behalf of the parties. The application for leave to amend must consequently remain rejected. This does not, however, mean that if the plaintiff wishes to make any other application for leave to amend, that application for leave to amend would have to be necessarily refused. If and when an application is made by either one party or the other, it would be heard and decided by the trial Court according to law.

[16] The case must now go back for decision on the merits in the light of the observations contained in this judgment. It is unnecessary to pass any orders with regard to costs of this appeal at this stage. They will be costs in the cause. The case has been pending for many years and would now be taken up by the Subordinate Judge and decided expeditiously. The parties have been directed to appear before the trial Court on 18th February 1946.

Mahajan J. — I agree.

V.R./D.H.

Case remanded.

[Case No. 80.]

A. I. R. (33) 1946 Lahore 424

ABDUL RASHID AG. C. J. AND
MAHAJAN J.

Punjab Government — Defendant

—Appellant

v.

Nur Mahi and others — Plaintiffs

—Respondents.

Regular Second Appeal No. 1148 of 1940, Decided on 22nd November 1945, from judgment of Mahajan J., D/- 17th May 1945.

Punjab Alienation of Land Act (13 [XIII] of 1900), S. 4 (2)— Suit for declaration that plaintiffs are Awans by caste and not Maliars — S. 4 (2) does not apply.

If a person, who does not enjoy the status of a member of a notified agricultural tribe claims that he is really a member of that tribe, then the matter is certainly within the jurisdiction of the Deputy Commissioner as provided in S. 4 but where a person is already enjoying the status of a member of a notified agricultural tribe under the Punjab Land Alienation Act and he has all the privileges which that Act gives, then no question under the Act can possibly arise which the Deputy Commissioner can determine. Both Awans and Maliars are members of notified agricultural tribes in the district of Jhelum. They are both members of the same group of agricultural tribes. Hence in a suit for a declaration to the effect that the plaintiffs are Awans by caste and that they have been erroneously entered in the revenue records as Maliars, there is no contest between the plaintiffs and the defendants as to whether the plaintiffs are or are not members of a notified agricultural tribe. Therefore sub-s. (2) of S. 4, Punjab Alienation of Land Act, has no application whatever to such a case and the Civil Court is entitled to give the plaintiffs the declaration as regards their caste and status. [P 426 C 1]

S. M. Sikri for Advocate General —

for Appellant.

S. Bhagat Singh — for Respondents.

ORDER OF REFERENCE.

Mahajan J.— This second appeal arises out of a suit for a declaration that the plaintiffs are Awans by caste and they have been erroneously entered as Maliars in the

revenue records. It is alleged that the entry of their caste as Maliar is likely to operate to their prejudice in getting into Government service and, therefore, they are entitled to seek the declaration prayed for. The suit was contested by the Provincial Government on the plea that the plaintiffs are Maliars and not Awans. The trial Judge held that the plaintiffs had proved that they were Awans. He further found that both Maliars and Awans were members of the same group of agricultural tribes in the Jhelum district, and therefore so far as the Act was concerned this entry did not prejudicially affect them. It further held that in this country in view of the latest reforms, caste has become a very important factor and any misstatement with regard to it must be recognised to be a proper occasion for giving the subject a right to sue. In the result the plaintiffs were granted a declaration that they are Awans.

The Punjab Province appealed against this decision to the Court of the District Judge. Before the District Judge, a fresh point was taken to the effect that the Civil Court had no jurisdiction to entertain a suit of this type. Reliance was placed on the provisions of S. 4, Punjab Act, 10 [x] of 1938. This section is in the following terms:

“(2) If any question or doubt should arise as to whether a person is or is not a member of a notified agricultural tribe, the Deputy Commissioner shall after such enquiry as may be prescribed determine whether that person is to be deemed to be a member of the said agricultural tribe for the purposes of this Act.

(3) In passing an order under the above sub-section the Deputy Commissioner shall not be bound by any decree of a civil Court, and may review any order previously passed under that sub-section:

Provided that nothing in this section shall affect a decree passed in a suit instituted before the 15th June 1938.”

The learned District Judge held that as both Maliars and Awans were members of a notified agricultural tribe in the district, no question arose in the case whether a person was or was not a member of a notified agricultural tribe and, therefore, S. 4 had no application whatsoever to this case. He observed that the plaintiffs were asking to be declared Awans merely because they considered it to their advantage in other respects. On the merits, he affirmed the decision of the trial Judge that the plaintiffs were not Maliars but were Awans.

In second appeal it has been argued by Mr. Sikri that the phraseology employed in S. 4, sub-s. (2) was wide enough to include

within its scope the present suit. He argued that the question whether a person was a member of a particular notified agricultural tribe could only be determined by the Deputy Commissioner and that it was immaterial whether in this instance both Maliars and Awans were members of two different agricultural tribes. The learned counsel urged that it is possible that later on they may become members of different groups of agricultural tribes in the district and their privileges may vary. Therefore, this was a matter which could only be determined by the Deputy Commissioner and not by a civil Court. Mr. Bhagat Singh, on the other hand, argued that this section only applies where a doubt or a question arises whether a certain person is a member of an agricultural tribe or is not a member of any agricultural tribe in the district; in other words, his contention was that if a person, who is not a member of an agricultural tribe, claims that he belongs to a caste which is notified as an agricultural tribe, it is that matter alone that is within the exclusive jurisdiction of the Deputy Commissioner. But where no question arises so far as the Act is concerned, then this section has no application whatsoever. He argued that the present suit was concerned with the status of these plaintiffs in matters other than matters connected with the administration of the Punjab Land Alienation Act. Therefore, the civil Court had jurisdiction.

As at present advised, I am inclined to agree with the contention of Sardar Bhagat Singh and the view taken by the learned District Judge. The section has to be interpreted in view of the provisions and the policy of the Punjab Alienation of Land Act. If a person, who does not enjoy the status of a member of an agricultural tribe, claims that he is really a member of that tribe, then the matter is certainly within the jurisdiction of the Deputy Commissioner; but where a person is already enjoying the status of a member of an agricultural tribe under the Punjab Land Alienation Act and he has all the privileges which that Act gives, then no question under the Act can possibly arise which the Deputy Commissioner can determine. If that person claims that for the purpose of marriage relationship or for the purpose of adoption or making wills his caste is Awan and not Maliar that matter is certainly not within the cognizance of the Deputy Commissioner and the civil Court is entitled to give him a declaration in respect to his caste and his status

in those matters. The question, however, is of considerable importance because it may lead to conflicting decisions as to the caste of the same person between the civil Court and the Deputy Commissioner and the phraseology of the Act is by no means quite clear and is capable of the interpretation that Mr. Sikri wishes to place upon it. I, therefore, consider it proper that the matter be authoritatively decided by a Division Bench. I, therefore, refer this case for decision by a Division Bench and direct that the matter be placed before his Lordship the Chief Justice for nominating a Bench for hearing this case.

J U D G M E N T

Abdul Rashid Ag. C. J. — This second appeal has arisen out of an action brought by Nur Mahi and others against the Provincial Government for a declaration to the effect that the plaintiffs are Awans by caste and that they have been erroneously entered in the revenue records as Maliars. The allegations of the plaintiffs are that the entry of their caste as Maliars is likely to prejudice their chances of getting into Government service and in their enlistment for military careers. They are, therefore, entitled to a declaration that they are Awans by caste. The main plea taken by the Provincial Government was that the plaintiffs were Maliars and not Awans, that they were Kamins in the village and could not, therefore, be declared as Awans. It was also denied that the plaintiffs had any cause of action against the defendants. The trial Court decreed the plaintiffs' claim. The appeal of the Provincial Government having been dismissed by the learned District Judge they have preferred a second appeal to this Court.

This second appeal came up for hearing before Mehr Chand Mahajan J. on 17th May 1945. The learned Judge referred the case to a Division Bench for an authoritative decision in view of the importance of the question. Mr. Sikri on behalf of the appellants urged that the present case was not cognizable by a civil Court and that the only person who could determine whether the plaintiffs were Awans or Maliars by caste was the Deputy Commissioner of the district. In support of his contention the learned counsel relied on sub-s. (2) of S. 4, Punjab Alienation of Land Act, which is in the following terms:

"(2) If any question or doubt should arise as to whether a person is or is not a member of a notified agricultural tribe, the Deputy Commissioner shall after such enquiry as may be pres-

cribed determine whether that person is to be deemed to be a member of the said agricultural tribe for the purposes of this Act."

Both Awans and Maliars are members of notified agricultural tribes in the district of Jhelum. They are both members of the same group of agricultural tribes. In the present case, in my opinion, no question has arisen as to whether the plaintiffs are or are not members of a notified agricultural tribe. This question would arise if the plaintiffs assert that they are members of a notified agricultural tribe and the defendants deny the plaintiffs' status as members of a notified agricultural tribe. When the plaintiffs assert that they are Awans, they are asserting that they are members of a notified agricultural tribe in the Jhelum District. When the defendants plead that the plaintiffs are Maliars, they are also pleading that the plaintiffs are members of a notified agricultural tribe, the Maliars being a notified agricultural tribe in the Jhelum District. There is, therefore, no contest between the plaintiffs and the defendants as to whether the plaintiffs are or are not members of a notified agricultural tribe. In my opinion, therefore, sub-s. (2) of S. 4, Punjab Alienation of Land Act has no application whatever to the facts of the present case.

It was next contended by Mr. Sikri, on behalf of the appellants, that the Provincial Government was interested in denying the status of the plaintiffs only for the purposes of the Alienation of Land Act and that as the plaintiffs would be entitled to the same privileges under this Act whether they were Awans or whether they were Maliars the defendants-appellants were not interested in the present litigation and that the defendants should not have been sued by the plaintiffs. It was maintained that if the plaintiffs so desired they could sue the Central Government. In my opinion this contention cannot be given effect to at this stage. The defendants asserted in their written statement that the plaintiffs were Kamins and that is why they could not be recorded in the revenue records as Awans. At that stage no prayer was made that the Central Government was the proper party to be sued in this litigation. For the reasons given above, I would affirm the decisions of the Courts below and dismiss this appeal with costs.

Mahajan J. — I agree.

D.S./D.H.

Appeal dismissed.

[Case No. 81.]

A. I. R. (33) 1946 Lahore 426

ABDUL RASHID AND ACHHRU RAM JJ.

Mt. Fatima — Defendant—Appellant

v.

*Sharaf Din and another, Plaintiffs
and another, Defendant*

— Respondents.

Second Appeal No. 1171 of 1944, Decided on 5th February 1946, from decree of District Judge, Jullundur, D/- 13th May 1944.

(a) Custom (Punjab) — Customary law of Jullundur District — Custom recorded in answers to questions 79 and 90 (A) is incorrect — Sonless Arian proprietor can validly dispose of ancestral property by will as well as by gift.

The distinction under the Punjab Customary law between power of gift *inter vivos* and power of testation is a matter of degree and form only, and where power of gift is shown to exist an initial presumption arises that there is a co-extensive power of testation. If a custom permitting a father to make a gift *inter vivos* of ancestral property in favour of his daughter is found to exist amongst the Arians of the Jullundur District, it must follow as a necessary corollary that the father has a similar power to dispose of his ancestral property in favour of his daughter by means of a will. That an Arian father in Jullundur district can make a valid gift of the whole of his ancestral property in favour of his daughter is well established. The statements as to custom recorded in the answer to question 79 that a man cannot dispose of his ancestral property by a will and to 90 (A) that he cannot make a gift of his ancestral property to his daughter without the consent of sons and nearer kindred in the Customary Law of the Jullundur district are not correct. Further there is no distinction in them between the restrictions imposed upon a father's power to make a will in favour of his daughter and his powers to make a gift in her favour, of his ancestral property. As under the Customary law of the province an unauthorised transfer by a male proprietor of his ancestral property is only voidable at the instance of the reversioners the effect of the statement as to custom in the answer to question 79 is not materially different from that of the statement contained in the answer to question 90 (A). Hence, amongst Arians of Jullundur a sonless proprietor can validly dispose of his ancestral property in favour of his daughter by means of a will as well as by means of a gift *inter vivos*: 48 P. R. 1903 (F.B.), *Foll.*; *Case law referred.* [P 428 C 1, 2; P 429 C 1, 2]

(b) Custom (Punjab)—Ancestral property—Unauthorised transfer by male proprietor — Transfer is voidable and can be validated by reversioner's consent.

Under the Customary law of the Punjab an unauthorised transfer by a male proprietor of his ancestral property is only voidable at the instance of the reversioners and can be validated by obtaining the consent of such reversioners either before or after the alienation. [P 428 C 2]

*Arjan Das and B. A. Cooper—*for Appellant.

*Mohammad Amin Khan —*for Respondents.

Achhru Ram J. — This is a second appeal from the decree of the learned District Judge of Jullundur affirming, on ap-

peal, the decree passed by the learned trial Judge whereby he had granted the plaintiffs a decree declaring that the consent decree obtained by Mt. Fatima, appellant, against her mother, Mt. Zainab should not affect the plaintiffs' reversionary rights after the death of the aforesaid Mt. Zainab in so far as the lands found to be ancestral *qua* the plaintiffs were concerned. The facts giving rise to this appeal may be briefly stated as follows. The parties are Arains of Nakodar tahsil in the district of Jullundur. Mohammad Bakhsh, the last holder of the property in dispute, died on 8th July 1938. On his death Mt. Fatima, his daughter, claimed the entire estate left by him, under an unregistered will said to have been executed by him in her favour on 14th June 1937. However, the Revenue Officer sanctioned the mutation of the landed property of Mohammad Bakhsh in the name of Mt. Zainab, his widow, by means of an order, dated 19th September 1939, and left Mt. Fatima to establish her rights under the will by means of a regular suit. Mt. Fatima accordingly brought a suit against her mother for a declaration to the effect that under the will of her father she was the sole owner of the property left by him. Mt. Zainab confessed judgment and on 19th January 1940 a consent decree was passed in Mt. Fatima's favour. On 13th March 1941 Sharaf Din and Khair Din, the real brothers of Mohammad Bakhsh, brought the suit that has given rise to the present second appeal claiming a declaration to the effect that the consent decree obtained by Mt. Fatima against her mother Mt. Zainab should not affect their reversionary rights after the death of Mt. Zainab. Mt. Fatima pleaded *inter alia* that the property in suit was not ancestral *qua* the plaintiffs and that in any case she was entitled to that property under the will of her father who according to the custom applicable to the parties had full power to dispose of all kinds of property held by him, ancestral as well as non-ancestral, by means of a will in her favour. On the pleadings of the parties, the learned trial Judge framed the following issues :

(1) Whether the property in dispute was ancestral *qua* the plaintiffs ? (2) Whether Mohammad Bakhsh deceased executed a valid will in favour of defendant 2 ? (3) Whether parties are governed by custom, what that custom is ? (4) Whether defendant 1 made any transfer of the property in dispute in favour of defendant 2 ? (5) Whether the court-fee paid is not correct and what should be the correct court-fee ? (6) Relief.

[2] Issue 3 was found in the plaintiffs' favour. On issue 4, it was held that the consent decree obtained by defendant 2 against defendant 1 could be attacked by the plaintiffs in the same manner in which they could have attacked an alienation by defendant 1, in favour of defendant 2, if independently of that decree defendant 2 had no title to the property covered thereby. On issue 1, a part of the property in dispute was held to be ancestral *qua* the plaintiffs, the rest being held to be non-ancestral. On issue 2, it was held that Mohammad Bakhsh did execute the will propounded by her in favour of defendant 2 but that according to the custom governing the parties the will was valid only to the extent of the self-acquired property of the testator and was invalid in so far as the ancestral property was concerned. Issue 5 was decided in the plaintiffs' favour. On these findings the plaintiffs were granted a declaratory decree in respect of the ancestral estate of Mohammad Bakhsh, their suit in respect of the non-ancestral estate being dismissed. The parties were left to bear their own costs. Mt. Fatima went up in appeal to the learned District Judge, while the plaintiffs filed cross-objections in respect of costs. The learned District Judge dismissed both the appeal and the cross-objections with costs. Mt. Fatima has come up in second appeal to this Court.

[3] The sole question that requires determination in the present appeal is whether the finding given by the learned District Judge as to the invalidity of the will in so far as it affected ancestral property left by Mohammad Bakhsh is concerned is correct. The learned Judge has relied on the answer to question 79 in the Customary Law of the Jullundur district and has held that according to the custom stated therein an Arain of Nakodar tahsil cannot validly dispose of his ancestral estate by means of a will in favour of his daughter. The appellant appears to have relied, in both the Courts below, on some judicial decisions upholding gifts of ancestral property by Arains of Jullundur district in favour of their daughters and to have contended that the power to make a will being co-extensive with the power to make a gift *inter vivos* the proof of a custom sanctioning gifts of ancestral property by sonless Arains to their daughters must be deemed to be sufficient to establish a similar custom in respect of wills. The learned District Judge has in agreement with learned trial Judge, repelled

this contention. He has in the first instance held that in the tribe of the parties the power to make a will is not co-extensive with the power to make a gift *inter vivos*. He has further held, relying on the answer to question 90 (A) in the Customary Law of the district, that even a gift *inter vivos* of ancestral property cannot be made by an Arain father in favour of his daughter except with the consent of his reversioners. After hearing the learned counsel for the parties, I am of the opinion that on both these points the learned District Judge has taken a wholly erroneous view.

[4] In 48 P. R. 1903,¹ a Full Bench of the Chief Court held that the distinction under the Punjab Customary Law between power of gift *inter vivos* and power of testation is a matter of degree and form only, and where power of gift is shown to exist an initial presumption arises that there is a co-extensive power of testation. This judgment of the Chief Court has been followed in a number of decisions of this Court. The question is dealt with at considerable length in para. 56-B of Rattigan's Digest of Customary Law and particularly in the second remark under that paragraph where all the relevant authorities are discussed. The learned District Judge does not dispute the correctness of the proposition. He is, however, of the view that the entries in the Customary Law of Jullundur district show that the presumption in favour of power of making a will being co-extensive with the power to make a gift *inter vivos* does not hold good in that district. A careful comparison, however, of the statements of custom obtained in the answers to questions 79 and 90 (A) which deal with powers to make wills and gifts respectively does not seem to support this view of the learned Judge. According to the answer to question 79, all the tribes of the Nakodar and Phillaur tahsils stated that a man could dispose of his self-acquired property by a written will but could not so dispose of his ancestral property. According to the answer to question 90 (A) all the tribes in the aforesaid two tahsils admitted the right of a father to make a gift of any part of his self-acquired property to his daughter otherwise than as her dowry but stated that he could not make a gift of his ancestral property to her without the consent of sons and near kindred. I do not find any distinction between the restrictions imposed upon a

father's power to make a will in favour of his daughter and his powers to make a gift in her favour of his ancestral property.

[5] It is true that in the answer to question 90 (A) it is stated that he can make such a gift with the consent of sons or near kindred (who may have the right to object to such a gift), and that the answer to question 79 simply says that a man cannot dispose of his ancestral property by means of a will at all. It is, however, well settled that under the Customary Law of the Province an unauthorised transfer by a male proprietor of his ancestral property is only voidable at the instance of the reversioners and can be validated by obtaining the consent of such reversioners either before or after the alienation. The effect of the statement as to custom contained in the answer to question 79 is, therefore, not materially different from that of the statement contained in the answer to question 90 (A). Assuming the statement of custom contained in the answers to the two questions to be correct, it cannot be said that the custom of the district really makes any distinction between the power to make a gift and the power to make a will.

[6] Indeed, in Jullundur district as early as 1877 powers of agriculturists in the matter of making wills were held to be co-extensive with their powers to make gifts *inter vivos*, *vide* 81 P. R. 1877.² In 8 Lah. 149³ in a case relating to Subzwari Sayad of Village Maw in Phillaur tahsil, after referring to questions and answers 79 and 90(A), a custom favouring the power to make a will of ancestral property was held proved on the strength of instances of gifts of similar property. At page 152 the argument that the instances cited were only cases of gifts *inter vivos* and could not therefore be regarded as sufficient evidence of a custom regarding the power to make a will was repelled on the authority of 48 P. R. 1903.¹ The learned counsel for the respondents was unable to draw our attention to any decided case in which a distinction was made between the powers of a male proprietor in Jullundur district to dispose of his ancestral property by means of a will and his powers to dispose of similar property by means of a gift *inter vivos*. I am, therefore, of the opinion that the ordinary presumption mentioned in 48 P. R. 1903¹ fully applies to this

1. ('03) 48 P. R. 1903 (F. B.), Mt. Bano v. Fatteh Khan.

2. ('77) 81 P. R. 1877, Partap Singh v. Bishan Singh.

3. ('27) 14 A. I. R. 1927 Lah. 261; 8 Lah. 149; 101 I. C. 818, Zakar Hussain v. Ghulam Fatima.

case and that if a custom permitting a father to make a gift *inter vivos* of ancestral property in favour of his daughter is found to exist amongst the Arains of the district, it must follow as a necessary corollary that the father has a similar power to dispose of his ancestral property in favour of his daughter by means of a will.

[7] That an Arain father in Jullundur district can make a valid gift of the whole of his ancestral property in favour of his daughter seems to be very well established. The earliest case in which this right of the father was upheld was a Division Bench judgment of the Chief Court in 92 P. R. 1888.⁴ Other cases in which gifts of ancestral property by Arain fathers in favour of their daughters were held valid according to the custom prevailing in the district were 2 P. R. 1897,⁵ 83 P. R. 1900,⁶ 133 P. R. 1906,⁷ a case from Nakodar tahsil, and 19 P. R. 1916.⁸ In A. I. R. 1936 Lah. 156⁹ a gift by an Arain of Nakodar tahsil of ancestral property in favour of his predeceased son's daughter was held valid. In A. I. R. 1938 Lah. 550¹⁰ a gift by an Arain sonless proprietor of the Jullundur tahsil of his ancestral land in favour of his sister's son was upheld.

[8] Indeed, the custom in favour of the validity of gifts and wills of ancestral property by Arain childless proprietors in favour of their daughters and daughters' issue seems to be so well recognised that even some of the plaintiffs' own witnesses were constrained to admit its existence. Sondhi (P. W. 1.) admitted that ancestral as well as non-ancestral land would be gifted or willed in favour of a daughter and to the same effect was the statement made by Pir Bakhsh (P. W. 3). They did seek to introduce a distinction between gift or will of land held by a proprietor as sole owner and gift or will of an undivided share in a joint holding. That distinction has, however, never been recognised by custom and there is no warrant for such distinction either in any of the decided cases or in the Customary law of the district. No instances have been cited

by any of the plaintiffs' witnesses in support of their statement as to the existence of such a distinction. On the other hand, four witnesses for the defendants, namely, Umar Din (D. W. 1), Ali Mohammad (D. W. 3), Nur Mohammad (D. W. 4) and Shah Mohammad (D. W. 5) have stated that the custom did not recognise any such distinction. Shah Mohammad P. W. who was examined by the plaintiffs in rebuttal after the conclusion of the defendants' evidence also disproved the existence of any such distinction and quite clearly admitted that amongst Arains a will could validly be made in favour of a daughter of an undivided share in a joint holding.

[9] Under the circumstances, it must be held that the statement as to custom recorded in the answers to questions 79 and 90(A) in the Customary law of the Jullundur district is not correct and that it has been proved quite satisfactorily that amongst Arains of the district a sonless proprietor can validly dispose of his ancestral property in favour of his daughter by means of a will as well as by means of a gift *inter vivos*. The will of Mohammad Bakhsh must accordingly be held to be valid even in respect of his ancestral property. For the reasons given above, I would allow this appeal and setting aside the judgments and the decrees of the two Courts below dismiss the plaintiffs' suit in its entirety. In the circumstances, I would leave the parties to bear their own costs throughout.

Abdul Rashid J.—I agree.

V.R./D.H.

Appeal allowed.

[Case No. 82.]

A. I. R. (33) 1946 Lahore 429

DIN MOHAMMAD AND MOHAMMAD
SHARIF JJ.

Gurprit Singh and another —

Plaintiffs — Appellants

v.

*Punjab Government — Defendant —
Respondent.*

First Appeal No. 229 of 1941, Decided on 21st February 1946.

Civil P. C. (1908), O. 23, R. 1 (2) (a) and (b)— Words 'other sufficient grounds' in R. 1 (2) (b) are not *eiusdem generis* with 'formal defect' in R. 1 (2) (a): ('25) 12 A. I. R. 1925 Lah. 497 = 90 I. C. 632; ('30) 17 A. I. R. 1930 Lah. 175 = 124 I. C. 686 and ('38) 25 A. I. R. 1938 Lah. 294 = 175 I. C. 56, OVERRULED.

The words 'other sufficient grounds' as used in O. 23, R. 1 (2) (b) are not *eiusdem generis* with

4. ('88) 92 P. R. 1888, Nihal v. Palla.

5. ('97) 2 P. R. 1897, Sadulla v. Hussain.

6. (1900) 83 P. R. 1900, Allah Dia v. Nur Bakhsh.

7. ('06) 133 P. R. 1906, Pala v. Nur Mohammad.

8. ('16) 3 A. I. R. 1916 Lah. 191: 19 P. R. 1916: 33 I. C. 787, Barkat Ali v. Sultan Bibi.

9. ('36) 23 A. I. R. 1936 Lah. 156: 161 I. C. 510, Buta v. Mt. Hapho.

10. ('38) 25 A. I. R. 1938 Lah. 550: I. L. R. (1938) Lah. 490: 178 I. C. 453, Umra v. Fateh-ud-Din.

the 'formal defect' referred to in R. 1 (2) (a). The words 'other sufficient grounds' are much wider in signification and can cover all those cases which appear to Court as affording such grounds : 13 M. I. A. 160 (P.C.), *Expl. and Disting.*; ('25) 12 A. I. R. 1925 Lah. 497=90 I. C. 632; ('30) 17 A. I. R. 1930 Lah. 175=124 I. C. 686 and ('38) 25 A.I.R. 1938 Lah. 294=175 I. C. 56, OVER-RULED; ('40) 27 A. I. R. 1940 Bom. 121 (F.B.), *Ref.* [P 432 C 1]

Where the plaintiffs were running a very great risk of losing a very valuable estate merely for the blunder of their counsel in not drafting a proper plaint and not claiming proper reliefs :

Held, that it was a fit case to grant the plaintiffs the necessary leave to withdraw from the suit with liberty to institute a fresh suit in respect of the same subject-matter even at the stage of appeal : ('18) 5 A. I. R. 1918 Mad. 1287 (F.B.), *Rel. on*; ('20) 7 A. I. R. 1920 Bom. 109; ('21) 8 A.I.R. 1921 Bom. 278 and ('15) 2 A. I. R. 1915 All. 123, *Ref.* [P 432 C 2]

Civil P. C. —

('41) Chitaley, O. 23, R. 1, N 26, Pts. 13, 11, 10.

('41) Mulla, P. 955, Pt. (p), Page 956, Pts. (q), (r).

Badri Dass and D. K. Mahajan —

for Appellants.

Basant Krishen, Advocate-General and S. M.

Sikri — for Respondents.

Din Mohammad J. — The facts giving rise to this appeal are these. In 1897 the heirs of one Mr. Dodgson sold the land in suit along with some other property to Sardar Gurdial Singh Mann for Rs. 30,000 (Ex. P-5 pp. 53 to 55). It was stated in the deed that a schedule was being attached thereto describing the property covered by the deed but unfortunately that document could not be traced. On the score of this deed S. Gurdial Singh Mann and his successors have been in possession of the land in suit since then. The property at the time of the sale was described as Dharamsala Tea Estate, and it is contended on behalf of the plaintiffs that it has retained the same character throughout this period. It appears that prior to the property coming into possession of Mr. Dodgson it had been in possession of one Captain Molyneux Batt who had acquired it from Captain White.

[2] The history of this land goes back only to 1887-88 when it was shown as owned by the Government and possessed by Mr. Dodgson. Its total area was mentioned as 649 *kanals* 19 *marlas*, of which 150 *kanals* 17 *marlas* were shown a *nehri* (canal irrigated) and 499 *kanals* 2 *marlas* as *banjar qadim*. The column relating to rent was altogether blank and so was the one relating to revenue (Ex. P-7 pp. 47-48). The same state of affairs prevailed at the time of the settlement of 1891-92, with this difference, however, that the entire area was shown as *ghair mumkin* (Ex. P-6 pp. 49-50). Exhibit

S. K./1 prepared by the special qanungo and printed at pages 86 to 122 may also be referred to with advantage in this connection. In 1897-98, in the column of cultivator it is stated as follows : "Mr. Dodgson vendor, S. Gurdial Singh, son of S. Bir Singh, vendee. Under the possession of the vendee." In 1908-09 this land was for the first time subjected to a rent of Rs. 25 per annum and in the column relating to area besides describing some of the parcels of land as *nehri* and *banjar abadi* and *kuhl* were also shown there. This evidently means that some bungalows and water courses were in existence then. This state of affairs continued up to November 1939 when the Collector served a notice upon S. Gurprit Singh and Gurbhainik Singh, grandsons of S. Gurdial Singh, to the effect that the rent of the land had been enhanced to Rs. 100. Thereupon they instituted a suit against the Punjab Government claiming in the alternative a declaratory decree to the effect : (a) that they were the lawful owners and possessors of the land in suit; or (b) that they were not liable to be ejected or to pay enhanced rent owing to their adverse possession for more than 75 years; or (c) that even if they were held to be tenants they were not liable to be ejected or to pay any enhanced rent as they were either occupancy tenants or tenants claiming special rights; or (d) at any rate, no enhanced rent could be demanded from them, nor could they be ejected unless and until they were paid Rs. 2,50,000 as compensation for improvements effected in the shape of tea bushes etc. The defendant controverted all the allegations made in the plaint and claimed that the plaintiffs held no status other than that of non-occupancy tenants and consequently not only their rent could be enhanced but they were also liable to be ejected. On 18th July 1940, Lala Jaishi Ram pleader for the plaintiffs, made a statement giving up the relief as regards the plaintiffs being occupancy tenants or tenants with special rights or being entitled to compensation as such.

[3] On the pleadings of the parties the following five material issues were raised : (1) Did the plaintiffs purchase the land in suit from Mr. Dodgson and was he the owner thereof and if so, are the plaintiffs owners? (2) Have the plaintiffs been in adverse possession of the land for the statutory period of 60 years and has their possession ripened into ownership? (3) Is the defendant estopped from challenging the owner-

ship of the plaintiffs? (4) Can the plaintiffs get the question of compensation decided in this Court? (5) If so, did they effect any improvements on the land and are they entitled to any compensation therefor and how much? The Subordinate Judge found all the issues against the plaintiffs and dismissed their suit. Being dissatisfied with this judgment, the plaintiffs appealed contending *inter alia* that "in any case the obvious inference from facts was that the land was occupied by them, and their predecessors-in-interest for buildings and gardens i. e., works of a permanent character, and plaintiffs were either permanent tenants of the land under the buildings, tea factory, fruit and tea garden, or held an irrevocable and heritable license over it."

[4] Counsel for the appellants argues that the appellants as well as their predecessors-in-interest have been in constant occupation of this land since 1860 and that even Government itself has treated their tenure as transferable and heritable. They have expended huge sums on effecting improvements on the land in suit and even if it were found that they were not the owners thereof, their status was much higher than that of mere non-occupancy tenants. Unfortunately, that aspect of the case has not been investigated as their counsel wrongly made a statement at the commencement of the trial that he abandoned that relief and the appellants have thus been seriously prejudiced in the conduct of their case. They had succeeded in tracing certain old documents which threw sufficient light on the matter at issue and he consequently prayed on this behalf that they may be permitted to lead additional evidence. Faced, however, with the difficulty of bringing his case within the four corners of O. 41, R. 27, Civil P. C., especially in the light of the observations made by their Lordships of the Privy Council in 10 Pat. 654¹ at p. 668, counsel eventually gave up this position. He then made an application that inasmuch as the appellants' case has been misconceived and mishandled, and for a mere formal defect they ran the risk of losing a vast estate of which they and their predecessors in title have been in occupation for nearly three quarters of a century, in the interests of justice they may be allowed to withdraw the suit with liberty to bring a fresh suit in respect of the same subject-matter. The Advocate-General, how-

ever, resisted this application urging that this Court could not grant them the necessary leave as the suit was not failing by reason of any formal defect or for any other reason analogous thereto. In support of his contention he relied on 13 M. I. A. 160,² A. I. R. 1925 Lah. 497,³ A. I. R. 1930 Lah. 175,⁴ A. I. R. 1938 Lah. 294,⁵ I. L. R. (1940) Bom. 299⁶ and A. I. R. 1944 Nag. 183.⁷ In 13 M. I. A. 160² it was observed at pp. 169-170 :

"We have not been referred to any case, nor are we aware of any authority which sanctions the exercise by the Country Courts of India of that power which Courts of Equity in this Country occasionally exercise, of dismissing a suit with liberty to the plaintiff to bring a fresh suit for the same matter. Nor is what is technically known in England as a nonsuit, known in those Courts. There is a proceeding in those Courts called a nonsuit, which operates as a dismissal of the suit without barring the right of the party to litigate the matter in a fresh suit; but that seems to be limited to cases of mis-joinder either of parties or of the matters in contest in the suit; to cases in which a material document has been rejected because it has not borne the proper stamp, and to cases in which there has been an erroneous valuation of the subject of the suit. In all those cases the suit fails by reason of some point of form, but their Lordships are aware of no case in which, upon an issue joined, and the party having failed to produce the evidence which he was bound to produce in support of that issue, liberty has been given to him to bring a second suit except in the particular instance that is now before them."

[5] Suffice it to say that these observations were made in a suit which had been decided even before the Code of Civil Procedure of 1859 was enacted. At any rate, although the judgment of their Lordships was given in 1869, no reference whatever was made therein to S. 97 of that Code. Since then a specific provision of law has been introduced in O. 23, R. 1, Civil P. C., which clearly enacts that

"Where the Court is satisfied (a) that a suit must fail by reason of some formal defect, or (b) that there are other sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject-matter of a suit or part of a claim, it may, on such terms as it thinks fit, grant the plaintiff permission to withdraw from such suit or abandon such part of a claim with liberty to institute a fresh suit

2. ('69) 13 M. I. A. 160 : 3 Beng. L. R. 48 : 2 Sar. 500 : 2 Suther 269 (P. C.), Robert Waston & Co. v. Collector of Zillah Rajshahye.

3. ('25) 12 A. I. R. 1925 Lah. 497 : 90 I. C. 632, Ishar Das v. Lal Singh.

4. ('30) 17 A. I. R. 1930 Lah. 175 : 124 I. C. 686, Buta Singh v. Hardit Singh.

5. ('38) 25 A. I. R. 1938 Lah. 294 : 175 I. C. 56, Mt. Fatima v. Nura.

6. ('40) 27 A. I. R. 1940 Bom. 121 : I. L. R. (1940) Bom. 299 : 187 I. C. 409 (F.B.), Ramrao Bhagwantrao v. Appanna.

7. ('44) 31 A. I. R. 1944 Nag. 183 : I. L. R. (1944) Nag. 458 : 217 I. C. 303, Sukhain v. Co-operative Society, Pondi Simaria.

1. ('31) 18 A. I. R. 1931 P. C. 143 : 10 Pat. 654 : 58 I. A. 254 : 132 I. C. 721 (P. C.), Parshotim Thakur v. Lal Mohar Thakur.

in respect of the subject-matter of such suit or such part of a claim."

[6] It may also be remarked that the formal defects enumerated by their Lordships of the Privy Council do not appear to be exhaustive. In fact, as enacted by O. 1, R. 9, Civil P. C., no suit in these days can be defeated by reason of the mis-joinder or non-joinder of parties. I do not, therefore, consider that this case renders any help to the respondent. The three Lahore judgments are all Single Bench cases and all that they lay down is that the words "other sufficient grounds" as used in O. 23, R. 1 (2) (b) are *ejusdem generis* with the defect referred to in R. 1 (2) (a). With all respect I do not consider that these cases lay down the law correctly. It is true that as stated in Maxwell's Interpretation of Statutes at p. 283 :

"When two words or expressions are coupled together, one of which generally includes the other, it is obvious that the more general term is used in a meaning excluding the specific one."

[7] Similarly, as observed at p. 284 :
"When two or more words which are susceptible of analogous meaning are coupled together *noscentur a sociis* they are understood to be used in their cognate sense. They take, as it were, their colour from each other, that is, the more general is restricted to a sense analogous to the less general."

[8] Further, as stated at p. 288, "one phrase or clause, in the same way, sometimes materially limits the effect of another with which it is associated," and as observed at p. 289 :

"the general word which follows particular and specific words of the same nature as itself takes its meaning from them, and is presumed to be restricted to the same genus as those words."

[9] But it will be obvious that these observations do not come into play at all in the case of an enactment in which the words are neither associated nor coupled together. Here, the "formal defect" is provided for in cl. (a) of sub-r. (2) and "other sufficient grounds" in cl. (b) of the same rule. If it was intended by the Legislature that the sufficient grounds contemplated in this rule be also *ejusdem generis* with "formal defect" they could easily have enacted both the provisions in one sub-rule. As I read the provision, the words "other sufficient grounds" are much wider in signification and can cover all those cases which appear to Court as affording such grounds. For the same reason I consider that the Full Bench decision reported as I.L.R. (1940) Bom. 299⁸ in observing that the grounds must be analogous to the formal defect places a restrictive meaning on this provision, even

though it rightly holds that the grounds may not be *ejusdem generis* with those words. A. I. R. 1944 Nag. 183⁷ is merely based on the Bombay decision and needs no further comment.

[10] Counsel for the appellants on the other hand relies on a Full Bench decision of the Madras High Court reported as 40 Mad. 259,⁸ where a suit was allowed to be withdrawn although, as stated at p. 264, it was going to fail for the formal defect that the plaint did not properly set out the plaintiff's title. Five Judges of the Madras High Court were of the opinion that O. 23, R. 1, fully governed the case. Reference in this connection may also be made to 44 Bom. 598,⁹ 45 Bom. 206¹⁰ and 37 ALL. 326.¹¹ I may observe that it is not disputed that this Court has power to order the withdrawal even at this stage. All that is contended is that the circumstances existing here do not justify this order and on the grounds set forth above I am not disposed to entertain this objection. It is obvious that the appellants, as stated by their counsel, run a very great risk of losing a very valuable estate merely for the blunder of their counsel in not drafting a proper plaint and not claiming proper reliefs. I consider, therefore, that this is a fit case in which the power vested in this Court by virtue of O. 23, R. 1, read with S. 107, sub-s. (2), Civil P. C., be exercised in their favour. I would accordingly grant the plaintiffs the necessary leave to withdraw from the suit with liberty to institute a fresh suit in respect of the same subject-matter. I would, however, make this order conditional on the appellants paying Rs. 1300 as costs to the respondents.

Mohammad Sharif J.—I agree.

N.S./D.H. *Leave to withdraw granted.*

8. ('18) 5 A.I.R. 1918 Mad. 1287 : 40 Mad. 259 : 37 I. C. 414 (F.B.), *Kamayya v. Papayya*.

9. ('20) 7 A.I.R. 1920 Bom. 109 : 44 Bom. 598 : 57 I. C. 530, *Chhanubhai Mansukh v. Dabhyabhai Govind*.

10. ('21) 8 A.I.R. 1921 Bom. 278 : 45 Bom. 206 : 59 I. C. 210, *Shek Hassan v. Mahomed Ali*.

11. ('15) 2 A.I.R. 1915 All. 123 : 37 All. 326 : 28 I. C. 857, *Mt. Afzal Begam v. Akbari Khanam*.

[Case No. 83.]

A. I. R. (33) 1946 Lahore 432

ABDUR RAHMAN AND MAHAJAN JJ.

Karim Ahmad—Plaintiff—Appellant
v.

Rahmat Elahi and others —

Defendants — Respondents.

First Appeal No. 150 of 1944, Decided on 22nd January 1946, from decree of Sub-Judge, 1st Class, Delhi, D/- 17th February 1944.

(a) Punjab Pre-emption Act (1 [I] of 1913), S. 7—Town founded by Moghuls — Presumption is in favour of existence of custom of pre-emption.

Principles of the Law of Pre-emption were introduced in this country by the Mahomedan Conquerors as the law of pre-emption is essentially a part of Mahomedan jurisprudence and a custom of pre-emption must be presumed to exist in a town founded by the Moghuls. [P 434 C 2; P 435 C 1]

The city of Delhi is mainly a Mahomedan city of Mahomedan origin and this fact by itself affords a presumption that the custom of pre-emption exists there. [P 434 C 2]

(b) Punjab Pre-emption Act (1 [I] of 1913), S. 7 — There is no presumption in favour of existence of recognised sub-divisions in town.

There is no presumption that a town has sub-divisions for the purposes of pre-emption law. It is a matter of proof in each case and it is for the person alleging the existence of sub-divisions to prove that they do exist. [P 436 C 1]

(c) Punjab Pre-emption Act (1 [I] of 1913), S. 7—Sub-division—Meaning of, explained — Mohalla is not synonymous with sub-division.

The word 'sub-division' has not been defined in the Act. It is, however, well settled that it is not in all cases synonymous with a Mohalla. The term implies a quarter of a town well-known and recognised and does not mean the streets and lanes of the town. A city may have Mohallas and Bazars and lanes with specific names but from this it does not follow that they are recognised sub-divisions for purposes of pre-emption law. [P 436 C 2]

(d) Punjab Pre-emption Act (1 [I] of 1913), S. 7—Sub-division—Test of.

The test of a place being a sub-division is that there should be something in its structure, situation and character which makes it a recognised unit for pre-emption law. Because the name of a quarter is well-known that fact does not necessarily make it a sub-division for the purposes of the Act. [P 437 C 2]

(e) Punjab Pre-emption Act (1 [I] of 1913), S. 5(a)—'Katra'—Term is not restricted to trade Katras but includes residential Katras also.

The statute of pre-emption restricts the freedom of contract and in the absence of a clear definition of the term 'Katra' in the Act, the term cannot be given a restricted or special meaning. The application of S. 5 cannot be restricted to trade Katras only and residential Katras in a city built in Katra form structurally cannot be held to fall outside the section. The term is to be given the ordinary dictionary meaning and that meaning is of an enclosure. In other words where within an enclosure a number of trade or residential buildings are constructed with one entrance and the quarter is styled as a Katra it falls within the exemption provided in S. 5 of the Act. [P 439 C 1; P 440 C 1]

Dr. Shuja-un-Din and Mela Ram Aggarwal
— for Appellant.

Shamsher Bahadur and Fazal-ul-Rahman
— for Respondents.

Mahajan J. — This appeal arises out of a suit for pre-emption in respect of a sale, dated 1st February 1942. Defendants 2 to 4 Haji Abdul Razzaq and others

owned two pieces of immovable property in Haveli Bakhtawar Khan, Gali Madrassa Hussain Bakhsh, Bazar Matia Mahal, Delhi City. The properties bear municipal Nos. 627 (A) and 620 to 623 in ward No. 9. One piece of property was described as a double-storeyed *katra* in the sale deed while the other piece of property was described as a double-storeyed house. Both these properties were sold by the owners for Rs. 16,000 on 1st February 1942 to Sheikh Rehmat Elahi, defendant 1. The plaintiff Sheikh Karim Ahmad instituted the present suit for pre-emption on the allegation that the custom of pre-emption existed in the locality where the property sold was situate and that he was owner of a contiguous house and hence entitled to a decree for possession by pre-emption on payment of Rs. 16,000 to defendant 1. The vendee did not admit the existence of the custom of pre-emption in the town of Delhi or in the locality in which the property in suit was situate. His counsel, however, admitted before issues that the custom of pre-emption existed generally in the town of Delhi enclosed within the city walls, but he denied that the custom of pre-emption prevailed in the locality where the property in suit was situate. It was contended that the town of Delhi was divided into sub-divisions but the counsel could not say in which particular sub-division the property in suit was situated. It was also pleaded that the suit was barred by limitation and that a part of the property being a *katra* was not pre-emptible. On the pleadings of the parties the following issues were framed :

(1) Are there no sub-divisions in the Delhi city enclosed by the city walls for the purpose of the Pre-emption Act? (1a) Does not the custom of pre-emption exist in the city of Delhi, enclosed by the city walls or in the sub-divisions if any, in which the property in suit is situated? (2) Is a part of the property in suit a *katra*, and is the plaintiff, therefore, not entitled to pre-empt the sale of the whole of the property or of a part of it? If so, the sale of which part of the property cannot be pre-empted? (3) Does the plaintiff possess a superior right of pre-emption as against defendant 1? (4) Is the plaintiff entitled to a decree for the whole or a part of the property in suit? If so, on payment of how much amount? (5) Is the plaintiff's suit within time? (6) To what relief is the plaintiff entitled?"

[2] The trial Judge laid onus of issue 1 in spite of defendant's protest on him on the ground that it was natural to expect that a large town like Delhi was divided into sub-divisions. It held that the town had been divided into different well recognised sub-divisions which may be taken as sub-divisions for the purposes of the

Pre-emption Act. On issue 1 (a) the learned Subordinate Judge found that on the evidence a finding could not be given that the custom of pre-emption existed in the sub-division of Matia Mahal where the property in suit was situated. Issue 2 was found in favour of the plaintiff and it was held that no part of the property was being used for commercial purposes and hence did not fall within the term "*katra*" as known to law. On issue 3 finding was given in favour of the plaintiff. Issue 4 was left undecided in view of the finding on issue 1 (a). The suit was held within time but as a result of the finding on issue 1 (a) it was dismissed with costs. The plaintiff has preferred this appeal.

[3] Three points were argued in this appeal before us, namely, those covered by issues 1, 1 (a) and 2. The finding of the trial Judge on issue 3 in favour of the plaintiff was not questioned. It was contended by the appellant's learned counsel that the burden of issue 1 was wrongly laid on the plaintiff and that the city of Delhi was not divided into recognised sub-divisions for the purposes of pre-emption. It was further argued that in any case the point was of academic interest only inasmuch as the custom of pre-emption existed in the whole city of Delhi enclosed by city walls and hence prevailed in all its sub-divisions, if any. The learned counsel for defendant 1 while repelling these contentions attacked the finding of the trial Judge on issue 2 as well and submitted that a part of the property in suit was a *katra* and had been described as such in a large number of documents and that from a structural point of view that property being a *katra* it was not necessary to prove its commercial user in order to bring it within the exception contained in S. 5 (a), Punjab Pre-emption Act. The learned counsel for the plaintiff-appellant in reply argued that the property sold was being used purely for residential purposes and could not be held to be a *katra* which expression according to the learned counsel meant a small square with shops on all sides and an open space in the middle and with an arched or other exit on one side into the street. I now proceed to examine the validity of these contentions. Section 7, Punjab Pre-emption Act is in these terms :

"Subject to the provisions of S. 5, a right of pre-emption shall exist in respect of urban immovable property in any town or sub-division of a town when a custom of pre-emption is proved to have been in existence in such town or sub-division

at the time of the commencement of this Act, and not otherwise."

[4] In his order of 27th January 1944 the learned Subordinate Judge made the following observations :

"On a review of the authorities referred to above and after considering the arguments addressed to me, I have come to the conclusion that in this particular case, by reason of the fact that in a large number of reported cases it has been held that the custom of pre-emption exists generally throughout the city of Delhi, and considering the further fact that no case has been shown to me, in which it has been held that this custom does not exist in the city of Delhi enclosed by the old city walls, the plaintiff is relieved from the obligation which S. 7, Punjab Pre-emption Act placed upon him, namely of proving the existence of this custom in the town of Delhi or in the sub-division, if any, in which the property in suit is situated. The initial presumption in this particular case, in my opinion, is in favour of the plaintiff."

[5] In his final judgment the learned Judge dealt with this matter thus :

"Not one instance of the custom of pre-emption relating to this sub-division has been brought on the record. On the other hand there is oral evidence of the defendant's witnesses to the effect that no sale of any such house in this Mohalla has ever been pre-empted. In the particular circumstances of this case, I am of the opinion, that this oral evidence proves the non-existence of the custom of pre-emption in this Mohalla and is sufficient to discharge the burden of proof which lay on the defendant. Moreover, the question of burden of proof is immaterial after evidence had been led and I cannot give a finding that the custom of pre-emption existed in this sub-division in the year 1913."

[6] The oral evidence pressed into service by the learned Subordinate Judge for a finding in favour of the defendant on the question of custom is of a worthless character. (After discussing the evidence his Lordship continued.) In my view the learned Subordinate Judge in his judgment under appeal erred in holding that the oral evidence led by the defendant had sufficiently discharged the burden of proof of issue 1 (a) laid on the defendant. Mere opinion evidence of this kind was of no avail unless it was supported by precedents.

[7] As early as in the year 1886 enquiry into the question of the existence of custom of pre-emption in the town of Delhi was made by Mr. Clifford who was then District Judge, Delhi. As many as sixty precedents were found relating to all parts of Delhi where the existence of custom of pre-emption had been held established. It must be observed that the city of Delhi is mainly a Mahomedan city of Mahomedan origin. This fact by itself affords a presumption that the custom of pre-emption exists there. It is an admitted proposition that the principles of the Law of Pre-emption were intro-

duced in this country by the Mahomedan conquerors as the Law of Pre-emption is essentially a part of Mahomedan jurisprudence and such a custom of pre-emption must be presumed to exist in a town founded by the Moghuls. In 116 P. R. 1908¹ it was said :

"There is ample authority for the proposition that the custom prevails very generally throughout the city of Delhi That being so, is there any reason to suppose that it does not exist in this particular locality ?"

[8] If the learned Subordinate Judge had judged the case from this angle of vision he would not have fallen into the error in which he fell in deciding issue 1 (a). It is a significant fact that it is not possible to discover a single case decided by the Punjab Chief Court or by this Court in which it had been held that such a custom does not prevail in any particular locality of Delhi city. In 2 Lah. 83² Sir Shadi Lal C. J. made the following observation :

"It is true that the custom of pre-emption has been held to prevail generally *throughout* the city of Delhi, but that applies only to the city proper, as circumscribed by the city walls constructed during the Moghul period, and has no application to a suburb which has grown up since the British rule."

[9] Mohalla Matia Mahal is a part of the old Moghul city and if the custom prevails throughout the old city it obviously prevails in this mohalla unless some very strong evidence to the contrary is forthcoming. When the custom is found to prevail throughout the town the question of subdivision of a town in my view loses all importance. As pointed out by Mr. Ellis in his Commentary on the Law of Pre-emption, the point that Delhi is divided into sub-divisions is of little importance as the custom has been found to prevail everywhere within the city walls. In 5 Lah. 109³ a Bench of this Court expressed the following opinion on this question :

"It has been first contended that the right of pre-emption does not exist in the Mohalla as it forms a defined sub-division of the city of Delhi and no evidence of special custom existing in that sub-division has been adduced on behalf of the plaintiff. It is admitted, however, that no evidence has been given on behalf of the defendants appellants that the Mohalla in which the house in dispute is situated is in fact a defined sub-division of the city. As found by the

learned Senior Subordinate Judge there is ample documentary evidence to show that the custom of pre-emption prevails generally in the city of Delhi. Over and above this, there is a volume of decisions to be found reported in the Punjab Records in which it was held that the custom of pre-emption did prevail in the city of Delhi generally. Some of those decisions are mentioned in Appendix V at p. 459 of Ellis' Law of Pre-emption in the Punjab. In 120 P. R. 1906⁴ the learned Judges who decided the case made the following observations: 'And we have in Mr. Clifford's judgment of 1886 no less than 60 instances in other parts of Delhi, and we have several rulings of this Court in which the existence of the right in various parts of Delhi was affirmed, and no instances have been produced by the defendant in which a claim to pre-emption has been successfully resisted. Under these circumstances, we think, without holding that Kucha Aqal Khan is a subdivision within the meaning of S. 6, Pre-emption Act, that the right of pre-emption does obtain in that locality and the plaintiff is entitled to possession, by pre-emption, of the house claimed.' This remark fully applies to the facts of the present case. In this case also not a single instance has been cited on behalf of the defendants in which a claim to pre-emption has been successfully resisted. In 122 P. R. 1906⁵ it was held that the custom of pre-emption prevailed generally in the Delhi city. Likewise in 116 P. R. 1908,¹ the learned Judges held that it had been settled beyond all doubts that in the Delhi city the custom of pre-emption prevailed very generally in respect of sales of residential houses. It is not necessary to refer to all the cases bearing on the question. We are unhesitatingly of opinion that the custom of pre-emption relied upon by the plaintiff does exist."

[10] If the case is judged in the light of the observations cited above it is clear beyond all doubt that issue 1 (a) should be found in plaintiff's favour and it should be held that the custom of pre-emption exists in Matia Mahal. It may also be mentioned that the plaintiff placed on record Exs. P-2 to P-9 which relate to four suits for pre-emption of sales of four different houses in Mohalla Churigaran, Bazaar Chitli Qabar and Mohalla Qharria. These are all adjoining Mohallas to Matia Mahal. One of the houses pre-empted in those suits is situate within a hundred yards of the house in suit. In these circumstances it is difficult to uphold the finding of the trial Judge on this issue and to find that Matia Mahal is such a peculiar or special place within the Delhi city where the custom of pre-emption does not exist. In his order of 27th Jaunary 1944 referred to above, the learned Subordinate Judge enunciated another proposition of law to which I am unable to subscribe. It is this :

"I am also of opinion that the presumption being in favour of the existence of recognised sub-

1. ('08) 116 P. R. 1908, Bhagwanti v. Sohan Lal.

2. ('21) 8 A. I. R. 1921 Lah. 69 : 2 Lah. 83 : 61 I. C. 325, Imperial Oil, Soap and General Mills v. M. Misbah-ud-Din.

3. ('24) 11 A. I. R. 1924 Lah. 495 : 5 Lah. 109 : 83 I. C. 180, Gokal Chand v. Sanwal Das.

4. ('06) 120 P. R. 1906, Abdulla Beg v. Walaiti Begam.

5. ('06) 122 P. R. 1906, Nawal Kishore v. Amir Khan.

divisions in the city of Delhi, it is for the plaintiff to prove that there are no such well recognised sub-divisions in this city for the purpose of the Pre-emption Act."

[11] For this view, the learned Subordinate Judge placed reliance on a Bench decision of the Chief Court in 44 P. R. 1903.⁶ On an examination of the decision in that case I find that it does not enunciate any such rule as has been stated by the learned Subordinate Judge. That was a case under S. 11, Punjab Laws Act and there it was held that every case must be judged by its own facts and no hard and fast rule can be laid down for determination of the point whether a particular quarter of a town should or should not be treated as a sub-division for purposes of the Pre-emption Law. It is not a matter of presumption that a town has sub-divisions for purposes of Pre-emption Law. On the other hand, it is a matter of proof in each case and it is for the person alleging the existence of sub-divisions to prove that they do exist. In my opinion, issue 1 was incorrectly framed by the learned Judge below and the onus was wrongly laid on the plaintiff. Be that as it may, evidence has been led on the point by the parties and the question of onus is no longer of any consequence. The learned Subordinate Judge held that the old city of Delhi had certain recognised sub-divisions for the purpose of Pre-emption Law on the basis of the following three considerations: (1) Evidence of D. Ws. 11, 12 and 13; (2) Decisions in a large number of cases of pre-emption relating to the town of Delhi enclosed in the city walls in which a number of localities, for instance, Gali Qasim Jan and Haveli Khan Dauran Khan have been held to be separate sub-divisions of Delhi city enclosed by the old city walls for the purpose of the Pre-emption Act. Reference in this connection was made to p. 187 of Ratan Lal's Pre-emption Act, Edn. 2. (3) Delhi is a large city founded by a Mahomedan Emperor more than 300 years ago and from this an inference can be drawn that it is divided into different well-recognised sub-divisions which may be taken as sub-divisions for the purpose of the Pre-emption Act.

[12] As regards the last consideration, suffice it to say that this is wholly irrelevant for the decision of this question of fact. As I have already pointed out, there is no presumption that a city has for purposes of pre-emption recognised sub-divisions until it is established as a fact on the evidence in each case. A

6. ('03) 44 P. R. 1903, Muhammad Nawaz Khan v. Mt. Bobo Sahib.

city may have Mohallas and Bazars and lanes with specific names but from this fact it does not follow that they are recognised sub-divisions for purposes of Pre-emption Law. It is a difficult matter in each case to say whether a particular quarter of the town should or should not be treated as a sub-division for purposes of Pre-emption Law. The word "sub-division" has not been defined in the Act but it has been held in several decisions of the Punjab Chief Court that it is not in all cases synonymous with a Mohalla and that the term sub-division implies a quarter of a town well known and recognised and does not mean the streets or lanes of the town. In my opinion, therefore, the third point considered by the Judge below was of no consequence and could not help in the determination of this issue.

[13] I have not been able to discover any large number of cases of pre-emption relating to the town of Delhi in which a number of localities have been held to be well-recognised sub-divisions of the old city founded by Emperor Shah Jahan. The two instances to which reference has been made do not support the view of the learned Subordinate Judge. In 64 P. R. 1887⁷ Sir Meredyth-Plowden J. observed as follows:

"I express no opinion as to whether a Mohalla is a sub-division of the city of Delhi, or whether the Naia Nazar is itself a Mohalla, or part of some other Mohalla."

[14] The point was left undecided in view of the fact that the nature of property being a *Katra* it was held not pre-emptible. It was further observed that the custom of pre-emption regarding residential houses did not necessarily extend to pre-emption of a collection of houses. 108 P. R. 1895⁸ is a case regarding a *tawela* in Mohalla Gali Qasam Jan. The question that the Gali was a well-recognised sub-division of the old city of Delhi was not considered. The only question decided was that the property being an old *tawela* was pre-emptible under the Punjab Laws Act. The question again arose in 116 P. R. 1908¹ and it was settled in the following manner:

"No doubt in some towns a *Mohalla* is a well recognised sub-division, as equally, without question, it is not such in other towns. No general rule therefore can be formulated upon this point, and in each case the question whether or not a particular locality constitutes a sub-division for the purposes of S. 11, Punjab Laws Act must be decided upon the evidence in that case. In the case now before us, we are not satisfied that the *Mohalla* in question has ever been recognised as

7. ('87) 64 P. R. 1887, Nanni Mal v. Sheo Nath.
8. ('95) 108 P. R. 1895, Mt. Nur Jahan v. Aziz-ud-Din.

such sub-division. We are not prepared, upon the evidence before us, to say that there are or are not sub-divisions of Delhi city, nor are we disposed to attempt the very difficult task of giving a general definition of the expression 'sub-division.' All that we do decide is that it has not been established to our satisfaction that the Mohalla Dassan is a sub-division of the city of Delhi."

[15] 147 P. R. 1908⁹ relates to Mohalla Haveli Khan Duran Khan, Delhi city, and the Judge below has referred to this case. On examination of this case, I find that nothing has been said therein on the question whether Delhi has sub-divisions for purposes of the Pre-emption law and whether that Mohalla should, therefore, be treated as a recognised sub-division for that purpose. The case was decided on the ground that the custom of pre-emption prevailed generally throughout the old city of Delhi. It seems that the learned Subordinate Judge did not himself examine the cases referred to in Mr. Ratan Lal's book and used the Commentator's statement without scrutiny and thus fell into an error. It is interesting to observe that in no case that came to the Punjab Chief Court an effort was made to decide whether the old Moghul town of Delhi had been divided into recognised sub-divisions for purposes of the Pre-emption law, because custom was found to prevail generally there. The learned counsel for the respondent was not able to point out to us the large number of decisions reference to which had been made by the learned Subordinate Judge. It appears that the Court below over-stated the case for the defendant in this matter. I find no clear precedent in the decided cases of the Chief Court for the view that any recognised sub-divisions exist in the town of Delhi for purposes of S. 7, Punjab Pre-emption Act. The only other matter on the basis of which the Subordinate Judge found the existence of well recognised sub-divisions in Delhi for purposes of the Pre-emption law is the evidence of the three witnesses, D. Ws. 11, 12 and 13 discussed above. I am not satisfied that these witnesses had any means of knowledge on the basis of which they could give evidence on the point. The ages of all of them go against their evidence being accepted on the point in question. D. W. 11 deposed :

"I have stated that there are some well-known sub-divisions of Delhi, because the name of the localities, mentioned by me above, are so well known that everybody understands when the name of any such locality is mentioned."

[16] The test of a place being a sub-division is that there should be something in its structure, situation and character which makes it a recognised unit for Pre-emption law. Because the name of a quarter is well known that fact does not necessarily make it a sub-division for the purpose of the Act. This evidence, even if accepted, is of a neutral character and does not establish the defendant's contention. The evidence of D. W. 12 suffers from the same defect. All he says is that there are some well-known localities in the town of Delhi, for instance, Sadar Bazar, Ballimaran, Kashmere Gate, Mori Gate etc. D. W. 13 stated that he could not differentiate between a locality and a sub-division. Kashmere Gate was a locality and so was Chitli Qabar. I am not satisfied that these witnesses had any idea as to what they were exactly saying. On the evidence above discussed, it cannot be held that it is established as a fact that the old Moghul town of Delhi has any well-recognised sub-divisions for the purposes of the Pre-emption Act. The situation in this case is the same as was before the Judges who decided the case in 116 P. R. 1908¹ and the observations made in that case can be appositely made here. The defendant's learned counsel in his statement before issues could not even say in what sub-division the property in suit was situate and the defendant in the witness box adopted a similar attitude. For the reasons given above I disagree with the finding of the Subordinate Judge on issues 1 and 1 (a) and reversing his finding on both these issues I find them in favour of the plaintiff.

[17] It is convenient now to consider the defendant's contention that a part of the property sold being a *katra*, the plaintiff's suit for pre-emption cannot succeed to that extent. This contention is based on the provisions of S. 5, Punjab Pre-emption Act which read thus :

"No right of pre-emption shall exist in respect of the sale of or the foreclosure of a right to redeem—(a) a shop, *sarai* or *katra*; (b) a dharamsala, mosque or other similar building."

[18] Part of the property in suit is described as a *katra*. It is said that 150 tenants live in this *katra*. The plan Ex. P-1 and the inspection note of the Judge show that there is one entrance to this part of the suit property styled as *katra* and there are residential *kothris* built in it which are let for residential purposes to various persons and in front of these *kothris* there is a common

9. ('08) 147 P. R. 1908, Abdul Ghafur Khan v. Muhammad Zai-ud-Din Khan.

open space. The whole thing is one enclosure. The plaintiff stated that the property in suit was in occupation of one or two tonga-drivers and washermen and that all these persons lived there with their families. The upper portion of the property was stated to be occupied by some carpenters and cap-makers who live there and prepare caps. There is no latrine in this part of the property. People use a latrine shown in the plan and which is in that part of the *katra* that belongs to the plaintiff. The property can be appropriately described as a residential *katra*. The plaintiff's first witness Munna Lal in the opening part of his examination-in-chief described this part of the suit property as a *katra* though later on he deviated from this statement. The defendant's witnesses described it as a *katra* and deposed that *katra* is a property which has a number of houses with one entrance and one latrine and these houses may be used for residence or as shops. The plaintiff's witnesses stated that a *katra* consisted of a number of shops with a courtyard in-between. The learned Subordinate Judge took the view that the main characteristics of a *katra* are that it constitutes a block of buildings used mainly for commercial purposes and in which the principal rooms are used as shops or for purely mercantile business. This view was based on two decisions reported in 71 I. C. 145¹⁰ and 83 P. R. 1901.¹¹ As no part of the property was being used for commercial purposes the learned trial Judge held that it was not a *katra* as that term was known to law. 71 I. C. 145¹⁰ is a Peshawar case and in this case Phipps J. C. observed as follows:

"Without going here into the exact meaning of the word '*katra*' it is sufficient to say that its main characteristics are that it constitutes a block of buildings used mainly for commercial purposes and of which the principal rooms are used as shops or for purely mercantile business."

[19] In the other case no such definition of '*katra*' has been given. The decision of the learned Subordinate Judge has, therefore, been influenced by the remarks of the Judicial Commissioner of Peshawar. In a large number of documents on the record, namely, Exs. D-2, D-4, D-27, D-28 and D-29 the property has been described as *katra* Haveli Bakhtawar Khan and from structural point of view it has been built in the form of a *katra*, that is, it is an

enclosure with a single entrance and is intended for use by a large number of persons for residential purposes. It is a conglomeration of residential tenements within an enclosure and common conveniences are provided for the occupants. No definition of the term "*katra*" is given in the Act. The common form of a *katra* in Delhi is a small square with shops on all four sides and an open space in the middle with an arched or other exit on one side into the street, but there are other kinds of *katras* also well known as such in Delhi itself, and evidence regarding their existence has been given on this record. These other kinds of *katras* have nothing to do with trade at all but are simply constituted of a square of houses identical in appearance to what may be called a trade *katra*. Again, there are *katras* which have both shops and houses inside. All these kinds of *katras* actually exist in Delhi as well as in other towns and the question for consideration is in what sense this term was employed by the draftsman of the Punjab Pre-emption Act. The matter is of considerable difficulty and the precedents available on the point do not suggest an easy solution of it. The primary meaning of a *katra* given by Platts in his dictionary is an "enclosure" and the secondary meaning is "market." Fallon defines "*katra*" as meaning "a market.... a quarter." It is suggested that it is on account of the large size and having different mercantile tenements that it is excluded from the operation of the Law of Pre-emption. In 64 P. R. 1887⁷ Plowden J. observed that proof that a right of pre-emption accrues by custom upon a sale of single shops, or single dwelling houses, does not establish that the same right accrues upon a sale of a whole street or bazar, or upon the sale of gardens in a city and that the distinction between single shops or dwelling houses and a collection of them such as a street, bazar or a *katra* is merely arbitrary. The point to decide is whether the term "*katra*" has been used by the Legislature in S. 5 (a) of the Act in a restricted and special sense, and was it intended to exempt a collection of shops with an enclosure alone from the operation of the Act or whether all properties, whether commercial or residential, if built in a collective form with an enclosure and a common entrance and with common conveniences and described and known as "*katra*" in popular parlance were intended to be excluded from the operation of the Act.

10. ('23) 71 I. C. 145 (Pesh.), Aya Ram v. Purshotam Lal.

11. ('01) 83 P. R. 1901, Hakim Rai v. Muhammad Din.

[20] As pointed out by Mr. Ellis in his commentary on the Law of Pre-emption, if by '*katra*' was meant strictly a trade *katra*, then it was quite unnecessary to draw a distinction between a *katra* and shop as has been done in S. 5 (a), for, if a shop is not liable to pre-emption, then a group of shops, no matter how many, would not be liable, and that if the word is used in that sense, then the prohibition is superfluous. The learned author pointed out that in several decisions of the Delhi Divisional Judge several residential *katras* had been treated as *katras* within the meaning of S. 5 of the Act. It was again observed that if one house as such is pre-emptible, why a group of houses be exempt as a whole. The statute of pre-emption restricts the freedom of contract and I am unable to hold that in absence of a clear definition of the term "*katra*" in the Act itself that a restricted or a special meaning should be given to this term and I do not see why the application of S. 5 should be restricted to trade *katras* only and why residential *katras* in a city built in *katra* form structurally should be held to fall outside this section. The ordinary dictionary meaning should be given to the term and that meaning is of an enclosure. In other words, where within an enclosure a number of trade or residential buildings are constructed with one entrance and the quarter is styled as a *katra*, it falls within the exemption provided in S. 5 of the Act. In 16 Lah. 103,¹² it was pointed out that all laws which put a restraint upon human activity and enterprise must be construed in a reasonable and generous spirit. In A. I. R. 1944 Lah. 422,¹³ it was observed that statutes that encroach on the rights of the subject whether as regards person or property should be interpreted if possible so as to respect such rights and the benefit of the doubt should be given to the person whose right is being affected. Remarks to a similar effect occur in the decision of their Lordships of the Privy Council in A. I. R. 1934 P. C. 36.¹⁴ If the Legislature has in express terms excluded a *katra* from the operation of the Act, then in my opinion all properties popularly known and styled as *katras* and constructed in the form of an enclosure with a common entrance in the street and containing a number of quarters

should be held to have been excluded from the operation of the Law of Pre-emption. There is no justification whatsoever for confining the scope of the term "*katra*" to a trade *katra* alone, even if it be conceded that ordinarily the term "*katra*" denotes a mercantile quarter.

[21] As suggested in 64 P. R. 1887⁷ by Plowden J. the exemption of property styled as *katra* may have been made on the ground of the size of the property. A collection of large number of shops or residential quarters seems to have been considered to be a ground for exemption on the principle that it was not just to give the owner of a small residential house whose house was contiguous to such a property the right to buy several houses, all of which were not contiguous to the plaintiff's house simply because they had been collectively built in one enclosure. It further seems that the sequence in which the term "*katra*" has been placed in S. 5 (a), Punjab Pre-emption Act, suggests that the intention was to exclude properties built in *katra* style, that is, collectively, whether for trade purposes or residential purposes, from the operation of law. The exemption regarding a *katra* does not follow the exemption concerning a shop but follows the exemption in respect of a *serai*. "*Serai*" has been exempted from pre-emption on the principle that there is no privacy about it and thus there will be no point in excluding strangers from buying such a property where all kinds of people can live. A neighbour has no choice in selecting his next door neighbour when the property contiguous is a public place and where in the course of the day all kinds of persons may come and stay. It seems that on similar grounds a *katra* has been exempted from the operation of the Pre-emption law. There is no privacy which has to be protected in a *katra*. A large number of persons either live there or conduct trade in that place. Whether it is a residential *katra* or a trade *katra* ingress to that place and egress from it is open to a considerable body of the members of the public. It has common conveniences for residents and a common entrance and a common open space. That being so, on no principle of Mahomedan jurisprudence which is the basis of the Law of Pre-emption in India a right of pre-emption could be conferred or exercised in respect of properties of this nature. *Serai* and a *katra* occurring in the sequence in which they do occur in S. 5 (a) of the Act lead me to the

12. ('34) 21 A. I. R. 1934 Lah. 777 : 16 Lah. 103: 153 I. C. 1020, Kartar Singh v. Ladha Singh.

13. ('44) 31 A.I.R. 1944 Lah. 422 : 217 I. C. 327, Nagin Singh v. L. Jagan Nath.

14. ('34) 21 A. I. R. 1934 P. C. 36: 148 I. C. 607, Jonathan Edward David v. S. P. A. DeSilva.

inference that in all likelihood the draftsman of the Act was excluding from the operation of the Act both trade and residential *katras* as by reason of their structure they were intended to be used by a large number of persons and it was not considered proper to confer a right of pre-emption in respect of such properties.

[22] For the reasons given above, I am of the opinion that the term "*katra*" in S. 5 (a) of the Act should be construed liberally and should be given a wider meaning and should not be restricted to trade *katras* only. Three kinds of *katras* described above exist in Delhi and other towns and except when they are synonymous with a Mohalla they fall within the exception contained in S. 5 (a), Punjab Pre-emption Act. The part of the property which is a *katra* has been fully described in the sale deed and in the plaint and that part, therefore, is not pre-emptible, and the plaintiff's suit cannot succeed in respect of it and must be dismissed. As regards the portion of the property which is described as a house in the sale deed and in the suit the plaintiff is entitled to a decree. The trial Judge has left undecided issue 4. In view of my findings on issues 1, 1 (a) and 2, it becomes necessary to determine this issue. The result, therefore, is that the case is remanded to the trial Judge under O. 41, R. 25, Civil P. C., for determination of issue 4. Parties have been directed to appear in the trial Court on 11th February 1946. The trial Judge will send a report on this issue within three months. On receipt of the report the parties will be given a fortnight to file objections, if any, to the report and the case will then be listed.

[23] **Abdur Rahman J.** — I have had the advantage of reading the judgment which my learned brother proposes to deliver and find myself in entire agreement with it. There are a large number of *muhallas* in Delhi, but I have not known any sub-division of the city for the purposes of pre-emption. The reason is not far to seek. The question whether there are sub-divisions of a town for purposes of pre-emption is only important when the custom of pre-emption is not found to exist in the town generally. But if the custom is found to be in existence in the town (and the presumption in regard to its existence in the city of Delhi was apparently raised by the learned Subordinate Judge for that reason and the onus of Issue 1 (a) consequently laid on the defendant), the fact whether the pre-empted

property is situate within one sub-division or the other is hardly material. That is why S. 7 speaks only of a 'sub-division of a town' after the words 'any town'. If the custom is found to exist in a town which means the whole of the town, it is unnecessary to consider whether it exists in the various sub-divisions of the same. The Subordinate Judge was led to frame the first issue and to place the onus of that issue on the plaintiff only because he did not clearly appreciate the provisions of S. 7 of the Act. In fact the frame of the issue of custom (Issue 1 (a)) with its legitimately placed burden on the defendant was antagonistic to the frame of the first issue and discloses a certain amount of loose thinking.

[24] As for the question whether '*katra*' should necessarily be commercial as held by the Judicial Commissioner in 71 I. C. 145¹⁰ before it could be held to be exempt from the provisions of the Pre-emption Act, I do not find any justification for that restricted meaning to be placed on that term. It is unnecessary for me to repeat the reasons advanced by my brother Mahajan, but I feel with him that the sequence of the words in S. 5 can be legitimately taken to imply that the term '*katra*' was placed by the Legislature at the end of S. 5 (a) with a purpose. If it had been employed to denote a collection of shops, it should have followed the term 'shop' rather than the term 'sarai'. By using the word 'shop', the Legislature had exempted commercial buildings constructed and used as such from being pre-empted. By using the word 'sarai', the Legislature exempted a group of residential quarters or rooms in respect of which the right of pre-emption could not be exercised. And then followed the term '*katra*' which could be either commercial or residential and which was excluded from the operation of the Act. This term does not, of course, apply to *katras*, such as *katra Nil* in Chandni Chowk where it is used as synonymous for *muhallas* or streets.

G.B./D.H.

Case remanded.

[Case No. 84.]

A. I. R. (33) 1946 Lahore 440

SALE AND MARTEN JJ.

Mrs. S. Weyman Jones—Appellant

v.

Owen Weyman Jones—Respondent.

Matrimonial Appeal No. 1 of 1944, Decided on 21st December 1945.

Indian and Colonial Divorce Jurisdiction Act, (16 and 17 Geo. V, Ch. 40) (1926), S. 1 — Domicile — Change of — Wife acquires

husband's domicile — Presumption is against change of domicile — Change must be strictly proved — Evidence must establish person's intention to settle in country of his choice and to abandon country of his origin — On facts held that such intention was proved and therefore Court had no jurisdiction to grant relief under Act.

A wife, whatever may be her own domicile, acquires by her marriage the domicile of her husband and it is only if his domicile be British that relief can be granted under the English Matrimonial Causes Act. [P 442 C 1]

The presumption of law is that the domicile of origin continues and is against change of domicile. A change of domicile has to be strictly proved and evidence of a mere expression of intention to change is not sufficient. To prove a change of domicile it is necessary that the evidence should establish the intention of a person permanently to settle down in the country of his choice, and to abandon for ever the country of his origin as his residence : ('43) 30 A. I. R. 1943 Lah. 62 (S.B.) and ('43) 30 A. I. R. 1943 Lah. 260 (S.B.), *Foll.*

[P 443 C 1]

A wife sued for dissolution of her marriage with the respondent under the Indian and Colonial Divorce Jurisdiction Act read with the English Matrimonial Causes Act. The respondent's grandfather who was born in Wales was the first to come out to Burma. The respondent's father was born in Wales but came out to Burma when very young, was educated at Rangoon and spent the whole of the 28 years of his life in Burma or in India before he was killed in a railway accident while employed as an English Driver in the Assam Bengal Railway. The respondent's mother was born in Rangoon and married in Rangoon ; and the respondent said that as far as he was aware she always belonged to Rangoon. She died when the respondent was an infant. The respondent was born in Rangoon and was educated partly in Burma and partly in India. He worked in the Rangoon Gazette for ten years, and being a member of the Burma Auxiliary Force volunteered for active service when the Japanese invaded Burma. The respondent asserted that he registered in the army as an Anglo-Burman. The respondent was married in Rangoon and had never given any indication that he ever wished to go to or retire in England. In fact, he stated definitely that he belonged to Burma :

Held, that though nothing material was known about the intentions of the grandfather, the inference to be drawn from the facts proved regarding the life of the respondent's father was that the father intended to settle down permanently in Rangoon or India as the country of his choice, and to abandon for ever, for purposes of residence, Wales as the country of his father's origin. This back-ground and the facts of the respondent's own life supported his assertion that he was an Anglo-Burman who belonged to Burma. In these circumstances, it could be held that the domicile of the respondent was not British and, therefore the Court had no jurisdiction to grant relief under the Indian and Colonial Divorce Jurisdiction Act. [P 443 C 1, 2]

K. L. Gauba and Jindra Lal for D. K. Mahajan—for Appellant.

Norman Edmunds and K. L. Kapur — for Respondent.

Sale J. — This is an appeal from a judgment of a learned Single Judge dismissing a wife's petition for dissolution of marriage. The petitioner, Mrs. Weyman Jones, was married to her husband, Owen Weyman Jones, then employed in a press in Rangoon, on 11th January 1939. The husband later, on the outbreak of war, joined the Burma Auxiliary Force and is now a Lance Bombardier. The petitioner, after the evacuation of Burma, moved to Delhi where she is now employed at American Army Headquarters. The parties last resided together in 1943 at Delhi. The petitioner, Mrs. Weyman Jones, sued for dissolution of her marriage on the grounds of her husband's adultery and cruelty, the suit being laid originally under the Indian and Colonial Divorce Jurisdiction Act read with the English Matrimonial Causes Act. She claimed that she and her husband were of British domicile.

[2] The husband respondent in traversing the allegations (other than admitting one act of adultery which, he alleged had been condoned) refused to admit British domicile, stated facts suggesting that he was not of British domicile, but in his pleadings very properly left the question to the decision of the Court. In replication, the petitioner pleaded that, if the finding of the Court be against her on the question of English domicile, thereby barring the application of the Indian and Colonial Divorce Jurisdiction Act, relief be granted to her under the Indian Divorce Act.

[3] On these pleadings the following issues were settled :

- "1. Is the domicile of the parties English?
2. Has adultery been committed by the respondent (a) at brothels in Calcutta in 1942 (which is, in fact, admitted by the respondent who pleads, however, that it has been condoned by the petitioner), (b) on the night of 18/19th March 1942, at the Royal Hotel, Delhi, which is denied by the respondent?
3. Has the adultery been condoned?
4. Has the petitioner's conduct conduced to the respondent's adultery?
5. Is there collusion or connivance?

[4] No issue was framed on the question of cruelty but the petitioner has led all the evidence available and it has not been suggested that the failure to frame an issue on the specific allegation of cruelty, has in any way prejudiced her case. The reason apparently for the absence of an issue on cruelty is that at the time when the issues were framed on 25th October 1943, it was assumed that the case was governed by the Indian and Colonial Divorce Jurisdiction Act and

the allegation of cruelty was not of importance. The application of the petitioner for alternative relief under the Indian Divorce Act was made later on 4th November 1943, but no request was made for any additional issue on the plea of cruelty, although proof of cruelty was essential for success under the Indian Divorce Act.

[5] The learned Single Judge held that the parties were of Burmese domicile and that the suit must accordingly be regarded as governed by the Burmese Divorce Act which in terms is the same as the Indian Divorce Act. As regards the question of adultery, the learned Single Judge has not given any clear finding, because he held, there is no satisfactory proof of cruelty without which no relief under the Indian or Burmese Act could be granted. He seems, however, to have accepted the contention of the respondent that the one admitted act of adultery committed in a brothel in Calcutta in 1942 was condoned by the petitioner; and he further appears to have accepted the denial by the respondent of the second alleged act of adultery at the Royal Hotel, Delhi, in March 1942. It is thus clear that the learned Single Judge dismissed the petitioner's suit for two reasons; (1) because he held that the domicile of the parties being non-British, the Court had no jurisdiction under the Indian and Colonial Divorce Jurisdiction Act; and (2) that the case being governed by the Indian or Burmese Act, must fail because whatever may be said about adultery, there is no proof of cruelty. From this decision the petitioner has appealed and we have heard Mr. Gauba on her behalf.

[6] The important question for decision in this appeal is the domicile of the husband. The petitioner, whatever may be her own domicile, has by her marriage acquired the domicile of her husband and it is only if his domicile be British that relief can be granted under the English Matrimonial Causes Act. It was no doubt to the interest of the petitioner to try and establish British domicile, as she might then have obtained a divorce on the ground of adultery alone, to which point the evidence is mainly directed. Mr. Gauba in arguing the appeal conceded that the evidence of cruelty is insufficient to enable him to challenge the finding of the learned Single Judge that cruelty has not been established. He mainly directed his arguments to the question of domicile.

[7] The facts bearing on this question are

as follows: The respondent, Owen Weyman Jones, is a resident of Burma in the third generation. His grandfather who was born in Wales was the first to come out to Burma but for the purposes of this case, nothing material is known about his life. The respondent's father was born in Wales but came out to Burma when very young, was educated at Rangoon and spent the whole of the 28 years of his life in Burma or in India before he was killed in Assam in a railway accident while employed as an English Driver in the Assam Bengal Railway. The respondent's mother was born in Rangoon and married his father in Rangoon; and the respondent says that as far as he is aware she always belonged to Rangoon. She died when the respondent was an infant. The respondent's father apparently married again but there is no evidence on this record regarding his second wife beyond mention of the fact that she was born in U. K., and was alive in 1943.

[8] The respondent says that he was born in Rangoon and was educated partly in Burma and partly in India. He worked in the Rangoon Gazette for ten years, and being a member of the Burma Auxiliary Force volunteered for active service when the Japanese invaded Burma. The respondent asserts (although the papers are not forthcoming owing to destruction at the time of the invasion of Burma) that he registered in the army as an Anglo-Burman. The trial Judge has believed this statement. As already stated, the respondent was married in Rangoon and he says that he has never given any indication that he ever wishes to go to or retire in England. In fact, he states definitely that he belongs to Burma. Finally the learned trial Judge has stated in the judgment that the respondent is by appearance what he himself claims to be, that is an Anglo Burman.

[9] Mr. Gauba urges that the domicile of origin in this case is British being that of the grandfather. He urges that the presumption of law is that the domicile of origin continues until a fresh domicile is acquired, that there is no evidence of the respondent ever having acquired either from his father or himself a fresh domicile and that, therefore, the domicile of origin belonging to the grandfather, must be held to apply also to the respondent in this case. As regards the averments of the respondent on this point, Mr. Gauba urges that the respondent being a minor i. e., 15 years old, when his father was killed, must be presumed at the time of his

father's death to have had the same domicile of origin as his father and grandfather, that having married at the age of 25 in 1939, it was still too early for him to make any new choice, and that as a result of the Japanese war from 1939 to 1945 and the consequent evacuation of Burma, there can be no question of the respondent having *acquired* Burmese domicile as held by the learned trial Judge.

[10] It is no doubt true, as held in A.I.R. 1943 Lah. 62¹ and A.I.R. 1943 Lah. 260² (both Special Benches of three Judges) that the presumption of law is that the domicile of origin continues and is against change of domicile. A change of domicile has to be strictly proved and evidence of a mere expression of intention to change is not sufficient. As laid down by the learned Chief Justice in A. I. R. 1943 Lah. 260:²

[11] To prove a change of domicile it is necessary that the evidence should establish the intention of a person permanently to settle down in the country of his choice and to abandon for ever the country of his origin as his residence."

[12] Now, apart from these legal principles, the facts in these two cited cases were entirely different. In A. I. R. 1943 Lah. 62,¹ the Court was dealing with a petitioner whose own domicile of origin was Scottish, who had only come to India in the army in 1937 and who claimed an Indian domicile by merely asserting that he intended to settle in India after his war service. The Court held that this bare statement was insufficient to discharge the onus of change of domicile. Similar were the facts in A. I. R. 1943 Lah. 260.² In the present case, however, we have to deal with a man who was born and bred in Burma and appears to regard Burma or India as his settled home. He belongs to the third generation of a family which, though the grandfather originally came from Wales, appears to have made Burma its home. It is true that nothing material is known about the intentions of the grandfather but the inference to be drawn from the facts proved regarding the life of the respondent's father, is that the father intended to settle down permanently in Rangoon or India as the country of his choice, and to abandon for ever, for purposes of residence, Wales as the country of his own father's origin. This background, and the facts of the

respondent's own life, support his assertion that he is, as he himself states, an Anglo-Burman who belongs to Burma. It would seem that a domicile in Burma (or India) was acquired in the lifetime of the respondent's father and the respondent himself is maintaining the non-English domicile which he acquired from his father, and which he is confirming by his own wish. In these circumstances, we see no reason to reject the respondent's own statement that he has always regarded himself as an Anglo-Burman who belongs to Burma and that he does not intend to retire to England.

[13] Without going so far as to agree with the learned trial Judge that the domicile of the respondent is necessarily Burmese, I agree that the learned Judge was undoubtedly right in holding that the domicile is not British, and that, therefore, the Court has no jurisdiction to grant relief under the Indian and Colonial Divorce Jurisdiction Act.

[14] Mr. Gauba suggested that the case might be remanded for further investigation on the question of domicile. He drew attention in this connection to the reference on the record to the respondent's stepmother having been born somewhere in the U. K., and suggested that the case be remanded to enable the petitioner to make enquiries about her. We consider, however, that no useful purpose would be served by remanding the case. Except for this reference to the stepmother, Mr. Gauba is not able to tell us what fresh evidence he would be able to bring to bear on the question of domicile. As regards the stepmother, it appears that she was available for evidence when this case was tried in 1943; and if the petitioner did not choose to call her then, we see no reason why she should be given any further opportunity now. Mr. Norman Edmunds for the respondent, objects strongly to a remand unless he is suitably indemnified by heavy costs; and there seems no object in burdening the petitioner with more expense for the purpose of a remand which is not likely, in our opinion, to add any material fact to what is already on record, or to serve any useful purpose. We, therefore, decline to remand, and we confirm the decision of the learned Single Judge on the question of domicile.

[15] This being so, the petitioner can only succeed if, in addition to the adultery alleged, cruelty be established. As pointed out by the learned trial Judge, there appears

1. ('43) 30 A. I. R. 1943 Lah. 62 : I. L. R. (1943) Lah. 489 : 205 I. C. 625 (S. B.), Robert Arthur v. Corwana Arthur.

2. ('43) 30 A. I. R. 1943 Lah. 260 : I. L. R. (1943) Lah. 765 : 209 I. C. 522 (S. B.), Finch v. Finch.

to have been only one alleged act of cruelty, and this is entirely dependent on the uncorroborated statement of the petitioner, with whose testimony the learned Single Judge was not impressed. He clearly preferred the respondent as a truthful witness; and the circumstances which, the petitioner alleged to amount to an act of cruelty, have been explained by the respondent in a very different light. Mr. Gauba himself finally had to concede that the evidence is insufficient to establish cruelty; and it was really for this reason that as a last resort on behalf of his client he suggested a remand on the question of domicile, a request which we have already rejected.

[16] We, therefore, agree with the learned trial Judge that cruelty is not established. In the circumstances, it is useless to discuss the evidence regarding adultery. As regards the alleged act of adultery in a brothel in Calcutta this may well have been condoned. But as regards the alleged act of adultery in a hotel at Delhi, the factum of adultery having been denied by the respondent there cannot be any question of condonation. The learned Judge appears to have accepted the denial by the respondent of adultery in the Royal Hotel, Delhi, as alleged. Without necessarily agreeing with the view of the learned Single Judge on this point, I am of opinion that his dismissal of the petition is correct. I would, therefore, dismiss the appeal and leave the parties to bear their own costs.

[17] **Marten J.** — I agree.

V.R./D.H.

Appeal dismissed.

[*Case. No 85.*]

A. I. R. (33) 1946 Lahore 444

TEJA SINGH AND MARTEN JJ.

Sadhu Singh—Plaintiff—Appellant

v.

Mt. Harnamon and others —

Defendants—Respondents.

First Appeal No. 104 of 1943, Decided on 16th January 1946, from decree of Sub.Judge, First Class, Amritsar, D/- 30th January 1943.

(a) Civil P. C. (1908), O. 41, R. 27 and S. 107 (d) — Discretion to admit additional documentary evidence in appeal — Party not diligent in getting it filed in trial Court—Discretion held should not be exercised.

In a suit for possession of certain property on the ground that it was ancestral property, the plaintiff did not produce copies of revenue records which were essential for proving the nature of the property, though he was represented by counsel and the suit was pending there for over 10 months.

In appeal the plaintiff sought to produce those documents on the ground that he was not aware of them:

Held that the discretion to admit additional documentary evidence in appeal could not be exercised in favour of the plaintiff as he was not diligent in getting it filed in the trial Court though the suit was pending there for over 10 months, and particularly because the Court was of opinion that the documents in question could not help him in any way. [P 445 C 2]

C. P. C. —

('44) Chitaley, O. 41, R. 27, N. 8, Pt. 15.

('41) Mulla, O. 41, R. 27, P. 1193, Pt. (m).

(b) Custom (Punjab)—Succession—Gil Jats of Amritsar district—Contest between collaterals and daughters of deceased — Daughters exclude collaterals if property is self-acquired — Onus is on collaterals to prove special custom — Contrary custom in *riwaj-i-am* — *Riwaj-i-am* is only a piece of evidence and cannot shift onus on to daughters—Daughters held had superior rights to succeed. ●

The general custom of the province, as laid down in Rattigan's Digest of Customary Law is that daughters exclude collaterals in succession to the self-acquired property of their father and therefore the initial onus is on the collaterals to show that the general custom in favour of the daughters' succession to the self-acquired property of their father has been varied by a special custom excluding the daughters; and the custom set out in the *riwaj-i-am*, that the agnates, however remote, exclude daughters from succession to their father's property whether ancestral or non-ancestral, being opposed to the general custom referred to above, the *riwaj-i-am* must be treated as only a piece of evidence and is not sufficient in itself to shift the onus from the collaterals on to the daughters: ('41) 28 A. I. R. 1941 P. C. 21 and ('44) 31 A.I.R. 1944 Lah. 72, *Rel. on.* [P 446 C 1]

Thus in a suit for possession of property brought by a collateral against the daughters of the deceased on the ground that the property was ancestral *qua* him, and according to the custom by which the parties who were Gil Jats of Amritsar district were governed, he had a superior right of succession to that of the daughters:

Held that the suit property not being proved to be ancestral, the daughters had the superior right to succeed to the property of their deceased father to that of the collateral as per general custom of the province: *Case law reviewed.* [P 450 C 1]

Shambu Lal and Amolak Ram Kapur —

for Appellant.

Inder Dev Dua and Chandra Gupta —

for Respondents.

Teja Singh J.—This is a first appeal from a judgment and decree of Bakhshi Manohar Singh, Subordinate Judge, First Class, Amritsar. Nihal Singh a Jat of village Khojkipur, Tarn Taran tahsil in the district of Amritsar, died leaving behind 272 *kanals* and 22 *marlas* of agricultural land, a house and a *haveli*. After him the property devolved upon his widow Mt. Jowali. On Mt. Jowali's death 167 *kanals* and 9 *marlas* of land was mutated by the revenue autho-

rities in favour of Sadhu Singh, Nihal Singh's collateral, and the remaining land in favour of his (Nihal Singh's) daughters Mt. Harnamon and Mt. Gango. Since the whole property including the land that had been mutated in Sadhu Singh's favour remained in the possession of Mt. Harnamon and Mt. Gango, Sadhu Singh brought a suit for possession against them alleging that the property was ancestral *qua* him and according to the custom by which the parties were governed his right of succession was superior to that of the daughters. A number of remote collaterals of Nihal Singh were also impleaded as *pro forma* defendants. Mt. Harnamon and Mt. Gango resisted the suit and joined issue with the plaintiff on all the points raised by him. The Court below held that the properties in dispute were not proved to be ancestral *qua* the plaintiff and that no special custom existed among the Jats of Amritsar by which the daughters were excluded by the collaterals of a deceased owner in succession to non-ancestral property. In the result it dismissed the plaintiff's suit with costs.

[2] It was admitted by the appellant's counsel that the onus to prove that the property was ancestral *qua* the plaintiff was rightly placed upon him and that in view of the evidence produced by him the Court below was right in coming to the conclusion that he had not discharged the onus. He, however, urged before us that we should allow him to produce additional documentary evidence in order to prove that out of the suit property the agricultural land was occupied by Gharat Singh, the common ancestor of the plaintiff and Nihal Singh. The evidence sought to be produced consisted of (1) copy of the pedigree-table prepared in the Settlement of 1865; (2) a copy of remarks appended to that table; (3) a judgment of this Court in *Kehr Singh v. Mt. Jowali* and (4) a copy of the mutation giving effect to the above mentioned judgment. The counsel urged that these copies could not be produced by the plaintiff in the trial Court, because he was not aware of their existence. I am not satisfied that the contention is correct. Mt. Jowali, it will be remembered, was Nihal Singh's widow and the litigation to which document No. 3 related was between her and a person who claimed to be the mortgagee of Nihal Singh's land. Taking into consideration the fact that the plaintiff was Nihal Singh's nearest reversioner I am not prepared to believe that he could

have remained ignorant of the dispute. So far as the revenue papers are concerned, all that I need say is that not only every lawyer but even ignorant zamindars are by now aware of the fact that when the question is whether a particular property is ancestral, the best mode of proving it is by production of copies from the revenue records, particularly the records of the earliest Settlement. The record shows that the plaintiff was represented by counsel. His suit which was instituted on 12th March 1942 remained pending till 30th January 1943. I cannot, therefore, understand why it never occurred to him or to his counsel during all this time to obtain the copies that he wants to produce now. There can be no doubt that he was not diligent, and I have no hesitation in holding that discretion to admit additional evidence in appeal cannot be exercised in his favour. Apart from this, I wish to observe that after having gone through the documents in question my opinion is that they cannot help the plaintiff in any way. The judgment that he wishes to produce was not *inter partes* and the respondents are not bound by any finding therein. The mutation which was based upon that judgment has no relevancy either. The pedigree-table of 1865 merely shows that Gharat Singh was the common ancestor, and it is now well settled that mere mention of common ancestor's name in the pedigree-table does not necessarily prove that every bit of land in possession of his descendants was once occupied by him. No inference regarding the ancestral nature of the property can be drawn from the remarks appended to that pedigree-table. I would accordingly reject the appellant's application for admission of additional evidence.

[3] The material question in the case is that of custom. As is laid down in para. 23 of Rattigan's Customary Law, the general custom of the province is that in regard to non-ancestral property the daughter is preferred to collaterals. Under remark 2 at page 130 of the edition of 1938 the learned author has observed that the agnatic theory reposes on the principle that collaterals descended from the common ancestor derive their title from that common ancestor, but when the common ancestor had no interest in the property in dispute his descendants derive from him no more right than he had, i. e., they acquire no right. Consequently, with regard to the acquired property, the collaterals derive no right from the common ancestor and in accordance with the well-

established custom of the province, are not to be preferred to a daughter of the last male owner. At one time the view of this Court was that there is no such thing as the general custom of the province and the correctness of the law relating to succession to acquired or non-ancestral property as laid down in para. 23 of the Rattigan's book was also doubted. But in face of what was held by their Lordships of the Privy Council in I.L.R. (1941) Lah. 154¹ this view is no longer good law. It was held by their Lordships that the customary rights of daughters against collaterals with reference to ancestral and non-ancestral land are stated in para. 23 of Rattigan's Digest of Customary Law, a book of unquestioned authority in the Punjab. They further held that the general custom of the province is that a daughter excludes collaterals in succession to self-acquired property of her father and the initial onus, therefore, is on the collaterals to show that the general custom in favour of the daughter's succession to self-acquired property of her father has been varied by a special custom excluding the daughters. In the present case the Sub-Judge laid the onus of the issue relating to the custom upon the daughters, evidently because the *riwaj-i-am* of Amritsar District prepared in 1914 provided that the agnate, however remote, excluded daughters from succession to their father's property whether ancestral or non-ancestral. There is no doubt that their Lordships of the Privy Council have held in more than one case that there is a presumption in favour of the existence of the custom set out in a *riwaj-i-am* and the onus lies upon the person who alleges a custom contrary to it. But the observations appearing in I. L. R. (1941) Lah. 154¹ which is the latest pronouncement of their Lordships on the point, make me think that when the custom set out in the *riwaj-i-am* is opposed to the general custom referred to in para. 23 of the Rattigan's Digest the *riwaj-i-am* must be treated as only a piece of evidence and is not sufficient in itself to shift the onus from the collaterals to the daughters. This is what their Lordships said after discussing the entire evidence in the case :

[4] "For the reasons indicated in this judgment, their Lordships are of opinion that the true legal position was that, the property being non-ancestral the initial onus lay on the plaintiffs

to prove that the general custom in favour of the daughter's succession had been varied by a special custom enabling the plaintiffs to exclude the daughters and that the plaintiffs have not discharged this onus. Their Lordships would add that even if it be held that the answers in Wilson's Manual raised an initial presumption against the daughters, having regard to the considerations mentioned in this judgment, it was a weak presumption, which has been sufficiently discharged by the evidence adduced in the case."

[5] It may be pointed out that in that case also the *riwaj-i-am* of the district was in favour of the collaterals and it was stated therein that the collaterals of a deceased proprietor excluded the daughters even with regard to non-ancestral property. In spite of this their Lordships held that the onus to prove their right of possession lay upon the collaterals. This question was recently considered by a Division Bench of this Court consisting of the Hon'ble the Chief Justice and Mahajan J. in A. I. R. 1944 Lah. 72² and I cannot do better than quote the remarks of Mahajan J. who wrote the judgment of the Division Bench and with whom his Lordship the Chief Justice agreed :

[6] "The initial onus is on the collaterals to prove that they have a right to inherit the non-ancestral land as against the daughters. The last portion of the paragraph of their Lordships' judgment cited above was only, to my mind, a decision in the alternative and does not lay down the rule to be followed in deciding such cases. As the High Court at Lahore had held that the initial onus was on the daughters to prove that they had a better right than the collaterals to the inheritance of their father relating to self-acquired property, their Lordships gave a decision in the alternative, and held that even if the initial onus was taken to be on the daughters, they had sufficiently discharged it by the evidence led in the case. Therefore, in my judgment, the correct method of deciding cases of this kind is that in the first instance the onus should be laid on the collaterals, and they should be given an opportunity to discharge that onus. This, however, does not resolve the question as to what should be the attitude adopted if the collaterals produce an entry in the *riwaj-i-am* of the district stating a special custom in their favour. Whether that entry would, by its own force or taken with other evidence, discharge the burden, would depend on the whole material placed on the record by the collaterals and the daughters."

[7] With these remarks I respectfully agree. After pointing out what attitude the Court should adopt when an entry in the *riwaj-i-am* opposed to the general custom is produced the learned Judge observed as follows :

[8] "But I may here state that if the *riwaj-i-am* produced is a reliable, and trustworthy document, has been carefully prepared, does not con-

1. ('41) 28 A. I. R. 1941 P. C. 21 : I. L. R. (1941) Lah. 154 : I. L. R. (1941) Kar. P. C. 22 : 68 I. A. 1: 193 J. C. 436 (P. C.), Mt. Subhani v. Nawab.

2. ('44) 31 A.I.R. 1944 Lah. 72 : I. L. R. (1945) Lah. 110 : 214 I. C. 34, Qamruddin v. Mt. Fateh Bano.

tain within its four corners contradictory statements of custom, and in the opinion of the settlement officer is not a record of the wishes of the persons appearing before him as to what the custom should be, in those circumstances the *riwaj-i-am* would be a presumptive piece of evidence in proof of the special custom set up which, if left unrebutted by the daughters, would lead to a result favourable to the collaterals. If, on the other hand, the *riwaj-i-am* is not a document of the kind indicated above, then to my mind such a *riwaj-i-am* would have no value at all as a presumptive piece of evidence."

[9] If I may say so with respect, these remarks cannot be taken to affect the question of onus which must be determined according to the law laid down in paragraph 23 of the Rattigan's Digest of Customary Law. My opinion, therefore is that in the present case the onus was wrongly placed upon the daughters. But since it appears that the daughters did not take any objection to the onus in the Court below and it is not urged that the parties would have produced more evidence on the question of custom had the onus been placed upon the collaterals, that is to say, the parties produced complete evidence, I think there is no necessity to reframe the issue and send back the case for retrial.

[10] I shall first deal with the value of the *riwaj-i-am*. The following are the questions and answers bearing on the respective rights of the daughters and collaterals:

[11] "Q. 60. Under what circumstances are daughters entitled to inherit? . . . If they are excluded by the near male kindred, is there any fixed limit of relationship within which such near kindred must stand towards the deceased in order to exclude his daughters? . . .

[12] A. 60. — According to the *riwaj-i-am* of 1865 sons exclude daughters. But nothing is said as to agnates. Nearly all tribes state that daughters are excluded by male lineal descendants through males and by the widow or widows of the deceased. Similarly nearly all of them say that agnates, however remote exclude daughters."

[13] After mentioning a few exceptions to the general rule the following note is added:

[14] "The exclusion of a daughter is so strict that even in those cases where there is no agnate at all, she is deprived of succession by members of the village community who may have no relationship at all with the deceased. The real fact is that daughters after their marriage often go to reside far away from their father's village and amongst families with whom her father's brother-hood has no sympathy. The result is that on her father's death she fails to get possession of his property and cannot get any support from the people of his village, even if she has the courage to lodge a suit in the Courts. The practice of some revenue officers to make mutations invariably follow possession referred to in 5 P. R. 1912 Rev.^{2a} frequently

prevents daughter succeeding to their father's property, when entitled to do so.

[15] Q. 61.—Is there any distinction as to the rights of daughters to inherit (1) the immovable or ancestral, (2) the movable or acquired property of their father?

[16] A. 61.—All Tribes—No distinction is made, and the answers to question 60 are applicable. But in reality daughters have a right to exclude agnates with respect to non-ancestral property, though the right is seldom asserted for the reasons given under answer 60."

[17] The author of the *riwaj-i-am* made the following remarks regarding the daughters' right in the introduction:

[18] "As regards daughters, the custom is anything but uniform; the general trend of opinion is that daughters succeed to the non-ancestral property to the exclusion of agnates, but never succeed to the ancestral property in the presence of near agnates. They are entitled to maintenance on the estate of the father till marriage, if they have not actually succeeded to a share in the property."

[19] This would go to show that the author himself was not satisfied that the answer to question 61 stated the existing custom correctly. In 13 Lah. 276³ Tek Chand J. after pointing out that the entries in the *riwaj-i-am* were entitled to an initial presumption in favour of their correctness observed that the quantum of evidence necessary to rebut this presumption would, however, vary with the facts and circumstances of each case; where, for instance, the *riwaj-i-am* laid down a custom in consonance with the general agricultural custom of the province, very strong proof would be required to displace this presumption, but, where, on the other hand, this was not the case and the custom as recorded in the *riwaj-i-am* was opposed to the rules generally prevalent, the presumption would be considerably weakened. Likewise, where the *riwaj-i-am* affected adversely the rights of females who had no opportunity whatever of appearing before the revenue authorities, the presumption would be weaker still, and only a few instances would suffice to rebut it. These remarks of the learned Judge were approved by their Lordships of the Privy Council in I. L. R. (1941) Lah. 154.¹ Viewed in this light, the value of the entries in the present *riwaj-i-am* is still further weakened. The *riwaj-i-am* of 1865 referred to in answer to question 60 was criticised in 5 P. R. 1885⁴ in the following words:

[20] "As to the Amritsar *riwaj-i-am* we have had occasion repeatedly to point out that its value as a true record of custom is very greatly affected by the tendency its compilers had rather to try and legislate as to what the custom should be, than unpretentiously to ascertain what it was."

3. (32) 19 A. I. R. 1932 Lah. 157 : 13 Lah. 276 : 135 I. C. 769, Khan Beg v. Mt. Fateh Khatun.

4. ('85) 5 P. R. 1885, Dial Singh v. Dewa Singh.

2a. ('12) 5 P. R. 1912 Rev.: 17 I. C. 979, Ghulam Mahomed v. Zewaro.

[21] That *riwaj-i-am* was again adversely commented upon in A. I. R. 1922 Lah. 392.⁵ In A. I. R. 1935 Lah. 419,⁶ which was also a case of Jats of Amritsar District and the question involved in which was the same as in the present case, a Division Bench of this Court came to the conclusion that the value of the custom stated in answer to question 60 was very much impaired by the compiler of the book and it was held that that opinion was entitled to weight. This case was followed by another Division Bench in A. I. R. 1936 Lah. 88.⁷ A different view was taken in 8 Lah. 281⁸ and this case was followed in A. I. R. 1933 Lah. 898,⁹ but the latter case was expressly dissented from in the 1936 case. A. I. R. 1936 Lah. 68¹⁰ decided by Addison Ag. C. J. and Din Muhammad J. was a case from Gurdaspur District, in which the contest was between the collaterals of fifth degree and daughters. The former relied upon the *riwaj-i-am* of 1913 in which it was mentioned that collateral, however remote, excluded daughter from succession to her father's non-ancestral property. It was held that the *riwaj-i-am* went too far and did not contain the correct statement of custom.

[22] Now as regards the instances. Some instances were deposed to by the parties' witnesses, but no importance can be attached to those that are not supported by any documentary evidence. In fact it must be said to the credit of the parties' counsel that neither of them relied upon oral instances. The written instances were only two, one put in by each side. Exhibit P-3, produced by the plaintiff, is a copy of the judgment of a Sub-Judge, First Class, dated 31st January 1933. The property in dispute belonged to a Jat. After his death his widow gifted it to her daughters. The collaterals of the deceased owner brought the usual suit for the cancellation of the gift. The daughters contended that the property being non-ancestral *qua* the plaintiffs and they being the next heirs the gift was tantamount to an acceleration of succession. In view of the entry in the *riwaj-i-am* the onus to prove that the collaterals could not succeed in the presence

of daughters was placed upon the latter. Neither party proved any instance in support of the custom alleged by it. The Court relying upon a few reported cases of this Court held that the collaterals excluded the daughters from succeeding to the self-acquired property of their father. Exhibit D-3 is a copy of a judgment of another Sub-Judge, First Class, dated 24th January 1938. Here also the parties were Jats of Amritsar District and it was held merely on the strength of the decisions of this Court that the daughters succeeded to the self-acquired property of their father in preference to the collaterals.

[23] The following cases were cited on behalf of the plaintiff-appellant: A. I. R. 1925 Lah. 556.¹¹—The parties were Sindhu Jats of Amritsar District. No instances were proved by either side and it was merely held on the strength of the *riwaj-i-am* of 1914 that the daughters were excluded by the collaterals of their father even with regard to his non-ancestral property. A. I. R. 1926 Lah. 142¹²—This was a case of Kamboh Jats. It was mentioned in the judgment that some instances were proved, but none of them was discussed. All that was held was that the entries in the *riwaj-i-am* of 1914 were a strong proof of custom and the daughters could not succeed to any kind of their father's property in the presence of collaterals. 8 Lah. 281⁸—The parties were Handal Jats of Amritsar District and the appeal arose out of a suit for a declaration that the alienation of certain self-acquired property of one Gurpal Singh, made by his widow after his death in favour of her daughter did not affect the reversionary interests of Gurpal Singh's collaterals. A number of instances were discussed, but it was mainly on account of entries in the *riwaj-i-am* of 1914 and on the authorities of A. I. R. 1925 Lah. 556¹¹ and A. I. R. 1926 Lah. 142¹² that the learned Judges held that special custom, whereby collaterals excluded the daughters from succession to non-ancestral property, had been established. A. I. R. 1933 Lah. 379.¹³ The parties to this case were Kamboh and there was some evidence relating to the existence of custom. The learned Judges held that most of the evidence was too vague to be of much assistance, but they thought that some of it

5. ('22) 9 A. I. R. 1922 Lah. 392 : 3 Lah. 257 : 68 I. C. 551, Gurdit Singh v. Mt. Ishar Kuar.

6. ('35) 22 A. I. R. 1935 Lah. 419 : 158 I. C. 976, Narain Singh v. Mt. Basant Kuar.

7. ('36) 23 A. I. R. 1936 Lah. 88 : 162 I. C. 934, Jawala Singh v. Thakar Singh.

8. ('27) 14 A. I. R. 1927 Lah. 241 : 8 Lah. 281 : 100 I. C. 924, Labh Singh v. Mt. Mango.

9. ('33) 20 A. I. R. 1933 Lah. 898 : 144 I. C. 483, Santa Singh v. Mt. Santi.

10. ('36) 23 A. I. R. 1936 Lah. 68 : 17 Lah. 101 : 161 I. C. 692, Kesar Singh v. Achhar Singh.

11. ('25) 12 A. I. R. 1925 Lah. 556 : 85 I. C. 783, Nadhan Singh v. Mt. Rajo.

12. ('26) 13 A. I. R. 1926 Lah. 142 : 89 I. C. 724, Mt. Naraini v. Jowahir Singh.

13. ('33) 20 A. I. R. 1933 Lah. 379 : 142 I. C. 68, Mt. Hardevi v. Mohan Singh.

taken together with this Court's decision in A. I. R. 1926 Lah. 142¹² justified the conclusion in favour of the collaterals. A. I. R. 1933 Lah. 898.⁹ This case was based upon the *riwaj-i-am* of 1914 and the reported cases of 1925, 1926 and 1927. 17 Lah. 296,¹⁴ a decision of Addison and Abdul Rashid JJ. The contest in the case was between the daughters and the collaterals of an Ablak Jat. The property was non-ancestral and the daughters who claimed to possess a better right than that of the collaterals, produced a number of instances in support of the custom alleged by them. The learned Judges rejected them all with the observation that "most of the instances relied upon, therefore, are not instances in favour of daughters, while the few, which are, have been decided on a wrong view of the onus." They cited three instances that were against the daughters but the main argument that they gave in favour of the collaterals was that there was no such thing as a general custom and the *riwaj-i-am* of 1914 was against the daughters. They also referred to and endorsed 8 Lah. 281.⁸

[24] On the other hand, the counsel for the daughters relied upon the following cases: 3 Lah. 257⁵ decided by Broadway and Abdul Qadir JJ. The parties therein were Gil Jats as are the parties in the present case. It was held that the property being non-ancestral and the general custom of the province being in favour of the daughters the entry in the *riwaj-i-am* was not sufficient to prove a custom to the contrary. A. I. R. 1935 Lah. 408¹⁵ (Hilton and Din Mohammad JJ.)—It relates to Khaira Jats of Amritsar District. A large number of reported cases and instances proved by the parties were discussed and it was held that no special custom was proved to exist among the parties' tribe whereby collaterals were preferred to daughters with regard to the non-ancestral property of their father. The entries in the *riwaj-i-am* were not followed and reliance was placed upon para. 23 of Rattigan's Digest of Customary Law. A. I. R. 1935 Lah. 419⁶ (Tek Chand and Skemp JJ.)—Here the competition was between the daughters and the nephew of the deceased owner. Eight instances were proved including a number of judicial instances. It was held that daughters excluded the collaterals from succession to the self

acquired property of their father. The learned Judges did not follow A. I. R. 1925 Lah. 556,¹¹ A. I. R. 1927 Lah. 241⁸ and A. I. R. 1933 Lah. 898,⁹ because no evidence was produced therein and they were decided against the daughters on the presumption of the *riwaj-i-am*. On the other hand they relied upon A. I. R. 1922 Lah. 392,⁵ A. I. R. 1928 Lah. 305¹⁶ and A. I. R. 1935 Lah. 408.¹⁵ This is what Skemp J. observed about them:

[25] "All these cases were decided after a consideration of instances. It is instances which make up custom and the important thing about the case law is that in this Court the cases in which instances have been cited have all been decided in favour of daughters."

[26] I may here observe that their Lordships of the Privy Council have also held that instances proved in an earlier case can be relied upon in a later case. The following is a quotation from their judgment in I. L. R. (1941) Lah. 154¹:

[27] "A judicial decision, though of comparatively recent date, may contain, on its records, evidence of specific instances, which are of sufficient antiquity to be of value in rebutting the presumption. In such a case, the value of the decision arises from the fact not that it is relevant under Ss. 13 and 42, Evidence Act as forming in itself a transaction by which the custom in question was recognised, etc., etc., but that it contains, on its records, a number of specific instances relating to the relevant custom. To ignore such judicial decisions merely on the basis of the *riwaj-i-am* would add greatly to the perplexities and difficulties proving a custom." (p. 187 of the printed report.)

[28] A. I. R. 1936 Lah. 88⁷ (Jai Lal and Sale JJ.). Parties were Bandhawa Jats of Amritsar District. It was held after a discussion of the instances proved and the cases cited before the learned Judges, that the presumption raised by the *riwaj-i-am* of 1914 in favour of the collaterals had been rebutted. A. I. R. 1936 Lah. 802¹⁷ (Bhide and Currie JJ.).—This case was decided in favour of the daughters and against collaterals of the second degree partly on the basis of instances proved on record and partly on the strength of decided cases. A. I. R. 1936 Lah. 991.¹⁸—This case was decided by the same Bench as the one preceding it. A. I. R. 1937 Lah. 306¹⁹ (Coldstream and Bhide JJ.).—Parties were Khaira Jats. While the collaterals produced no instances, the daughters were able to put

16. ('28) 15 A. I. R. 1928 Lah. 305 : 9 Lah. 352; 107 I. C. 280, Pir Bakhsh v. Mt. Ghulam Bibi.

17. ('36) 23 A. I. R. 1936 Lah. 802 : 167 I. C. 314, Jawala Singh v. Mt. Santi.

18. ('36) 23 A. I. R. 1936 Lah. 991 : 167 I. C. 710, Ujagar Singh v. Mt. Diyal Kaur.

19. ('37) 24 A. I. R. 1937 Lah. 306 : 174 I. C. 571, Mt. Hukmi v. Fauja Singh.

14. ('36) 23 A. I. R. 1936 Lah. 804 : 17 Lah. 296 : 168 I. C. 379, Kartar Singh v. Mt. Banto.

15. ('35) 22 A. I. R. 1935 Lah. 408 : 157 I. C. 114, Thakur Singh v. Dhankuar.

forward two judicial instances and the case was decided in their favour. A. I. R. 1938 Lah. 111²⁰ (Dalip Singh and Skemp JJ.).—The dispute related to the self-acquired property of a Sansi Jat and the contestants were his daughters on one side and the collaterals of 7th degree on the other. A number of instances were proved by the daughters and it was held that they excluded the collaterals. A.I.R. 1942 Lah. 164²¹ (Dalip Singh and Din Mohammad JJ.). — The parties were Hundal Jats of Amritsar District and the question for determination was the same as in the present case. Din Mohammad J. with whom Dalip Singh J. concurred, after discussing the case law on the point and the instances proved by the parties held that the daughters' right to succeed to their father's non-ancestral property was superior to that of the collaterals. The learned Judge also held that the initial onus was on the collaterals to show that the general custom in favour of the daughter's succession to the self-acquired property of her father had been varied by a special custom. The value of the entries in the *riwaj-i-am* of 1913-14 was also discussed.

[29] Three things are clear from the survey of the above-mentioned decisions: (1) that the recent decisions are mostly in favour of the daughters; (2) that the majority of decisions in favour of the daughters are based on the *riwaj-i-am* and in some the view taken was that there is no such thing as the general Customary Law of the Province and the law relating to succession to self-acquired property was wrongly laid down in para. 23 of the Rattigan's Digest of Customary Law—a view which has been expressly overruled by their Lordships of the Privy Council in I. L. R. (1944) Lah. 154¹ and (3) that a fairly large number of cases in favour of the daughters were decided on the strength of instances proved therein.

[30] For all these reasons I uphold the finding of the learned Sub-Judge that the daughters in this case have succeeded in discharging the onus that was placed upon them and it has been established that the property in suit not having been proved to be ancestral qua the plaintiff he cannot dispossess the daughters therefrom. The appeal accordingly fails and is dismissed with costs.

Marten J. — I agree.

V.W./K.S.

Appeal dismissed.

20. ('38) 25 A. I. R. 1938 Lah. 111 : 177 I. C. 420, Mt. Gango v. Mt. Hukam Kaur.

21. ('42) 29 A. I. R. 1942 Lah. 164 : 201 I. C. 118, Nawabv. Moti Ram.

[Case No. 86.]

A. I. R. (33) 1946 Lahore 450

ABDUR RAHMAN AND MAHAJAN JJ.

Rahmat Ali Shah and others — Defendants — Appellants

v.

Sardar Harbhajan Singh, Plaintiff and others, Defendants — Respondents.

First Appeal No. 122 of 1941, Decided on 14th February 1946, from decree of Sub-Judge, 1st Class, Ludhiana, D/- 22nd November 1940.

(a) Pleading—Contentions inconsistent with those raised in written statement cannot be allowed to be raised for first time in appeal.

It is not open to a person who is brought on the record in appeal as a legal representative of the defendant to raise for the first time in appeal contentions which are not only new but also inconsistent with those raised in the written statement put in by the defendant. [P 451 C 2]

(b) Husband and wife — Presumption of marriage—Woman living as concubine with another—Presumption of marriage cannot be raised by subsequent conduct and lapse of time—Same is position under Mahomedan law.

It cannot be presumed that a woman once a concubine, had, merely by lapse of time and propriety of conduct, become a wife, and the ordinary legal presumption is that there has been no marriage. Presumptions which might be raised in a case where the woman was not found to be a prostitute before the alleged marriage and where connection with her was not found to be adulterous in its inception can have no bearing on a case when these facts have been found to be established. Apart from the Anglo-Muhammadan Law or the Indian Evidence Act, the same conclusion would have to be drawn if the case were to be governed by unalloyed Muslim law. In fact under the Shia system of law no marriage is permissible between persons who have had illicit relations. It is true that the Sunni system is not so rigid and a marriage is permissible even if a connection has been adulterous at its inception. But even according to that system a marriage cannot be presumed on account of parties' subsequent conduct or by acknowledgment once it is found that the connection had been adulterous in the beginning: 11 M. I. A. 194 (P.C.), *Rel. on.*

[P 452 C 1, 2]

(c) Admissions—Admissions made by persons against their own interests—Evidentiary value.

If admissions are made by persons against their own interests they may be accepted as true unless shown to be otherwise. And the burden of proving them to be incorrect would lie on those who made them or on those who subsequently came to stand in their shoes. [P 453 C 1]

(d) Evidence — Burden of proof — Parties leading all evidence in support of their contentions—Question of onus is not of importance.

The question of onus is of no or very little importance at the stage of appeal when the parties have led all the evidence which they wished to adduce in support of their respective contentions.

[P 454 C 2]

(e) Husband and wife — Acknowledgment when evidence of legal marriage stated — Acknowledgment does not legitimize any person where marriage between his parents cannot be presumed.

While acknowledgment may be good evidence of a legal marriage in cases where marriage can be safely presumed it cannot be held so to be in the absence of any satisfactory and legal evidence of marriage in cases where the woman is found to be a prostitute and where the connection is found to have been adulterous in its inception. Acknowledgment may be evidence of a legal marriage in certain circumstances but it does not legitimize any person where a marriage between his parents cannot be in the circumstances presumed.

[P 455 C 2]

Dr. Shuja-ud-Din and Mohd. Jamil—
for Appellants.

S. Jhanda Singh and Inder Singh Karwal;
Mohd. Ali; and Feroze-ud-Din and Gopal
*Singh Chawla —*for Respondents 1; 3; and 7
respectively.

Abdur Rahman J. — This appeal arises out of a suit for recovery of possession of property most of which is situate in mauza Hirpur, Tahsil Jagraon, District Ludhiana. The suit was instituted by Sardar Harbhajan Singh on the allegation that he had purchased the property in dispute from one Dr. Feroze-ud-Din on 27th January 1937 (Ex. P.1) who had in his turn purchased the property from Abdul Majid on 27th February 1935 (Ex. P.2). As the property sold by Abdul Majid belonged to Ghulam Jilani and was said to have devolved on him in accordance with law by which both of them were governed, it would be better to set out their pedigree. It is as follows :

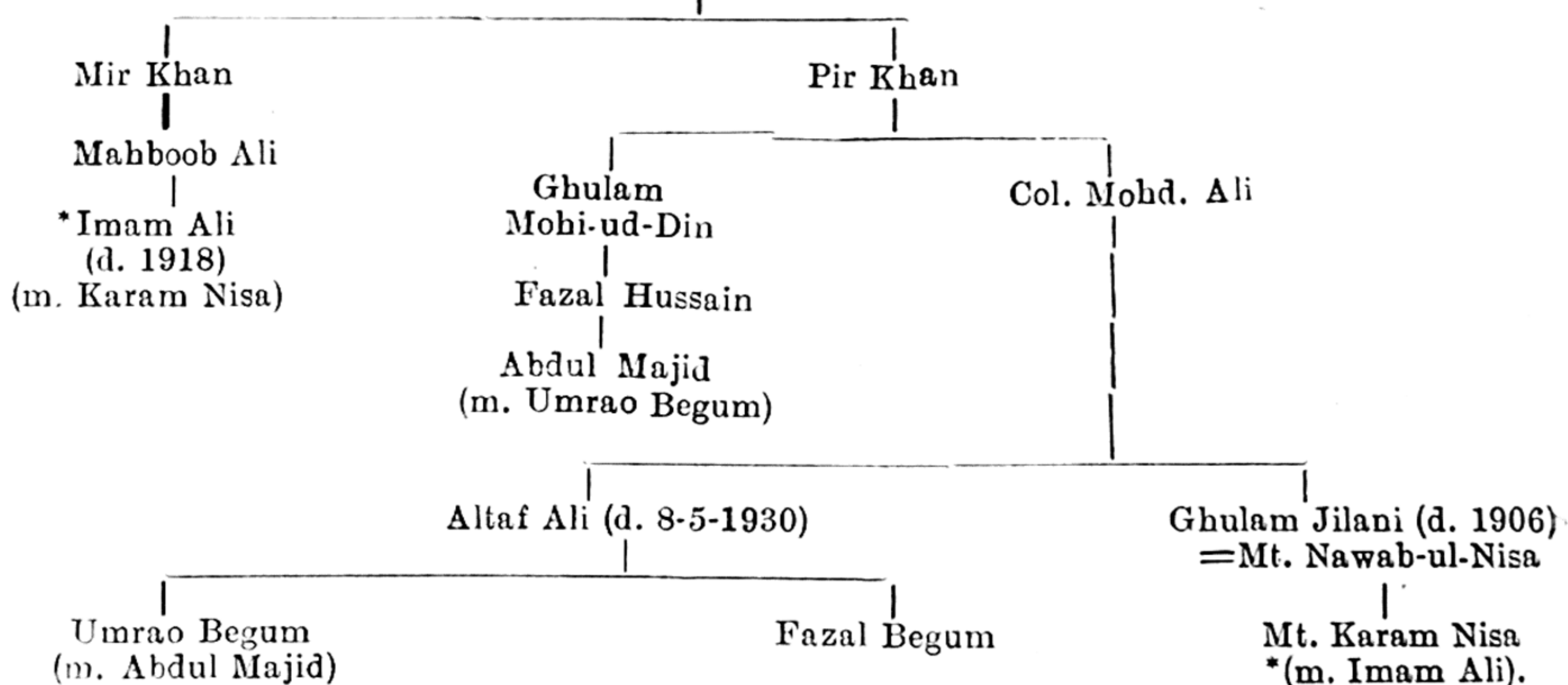
(See pedigree on page 452.)

[2] Abdul Majid's right to alienate the property was challenged by a number of alienees, who had alienations effected in their favour by one Ahmad Ali who had claimed to be a son of Ghulam Jilani by a woman named Mahbubani *alias* Khurshaid Begum. It was alleged that Ghulam Jilani had also married her. The plaintiff, on the other hand, contended that Ahmad Ali was not a legitimate son of Ghulam Jilani and alleged that his mother, Mahbubani *alias* Khurshaid Begum had never been married to Ghulam Jilani. A large number of other issues were also raised out of which one more need be stated. It was averred by the plaintiff that the alienations by Ahmad Ali in favour of the various alienees were without consideration. Ahmad Ali, who is a party to the present litigation, put in a written statement on 28th May 1940, in which he admitted the plaintiff's claim and in which he character-

ized the other alienees to be "swindlers" who had managed to secure certain deeds from him without any consideration and at a time when he was not in full possession of his senses. The trial Court decreed the claim as Ahmad Ali was found to be an illegitimate son of Ghulam Jilani and was found to have no interest in the property which was held to have duly devolved on Abdul Majid under the customary law after Altaf Ali's death in 1930. In the absence of any evidence on the record the lower Court also found the alienations in favour of the defendants to be without consideration. Nine of the alienees have appealed.

[3] It might be stated here that Ahmad Ali died during the pendency of this appeal and his daughter, Zarina Begum, has been brought on the record as his legal representative. During the course of arguments before us her learned counsel, Khwaja Feroze-ud-Din, wished to raise certain other contentions which were not only new but inconsistent with the written statement filed by her father. We did not permit him to raise them before us for the first time as it was not open to Zarina Begum, who was brought on the record as a legal representative of her father whom she was representing, to raise contentions which were not only new but inconsistent with those raised in the written statement put in by her father. From the brief narrative of facts it would thus be clear that the main question which arises for determination in this appeal relates to Ahmad Ali's legitimacy. This would depend upon the fact whether his mother had been legally married to Ghulam Jilani as it was more or less admitted and may be in any case taken to have been established that Ahmad Ali was a son of Khurshaid Begum *alias* Mahbubani and was born of Ghulam Jilani's loins when his mother was residing with Ghulam Jilani. Since it is possible in certain cases to raise a presumption of marriage from the proof of joint residence for a length of time or from recognition by a certain number of persons or from acknowledgment of parentage by a father, Dr. Shuja-ud-Din, learned counsel for the appellant, relying on certain decisions such as those reported in 38 ALL. 627,¹ 10 Lah. 725²

1. (16) 3 A. I. R. 1916 P. C. 27 : 38 All. 627 : 19 O. C. 192 : 43 I. A. 212 : 36 I. C. 104 (P. C.), Sadik Hussain Khan v. Hashim Ali Khan.
2. (29) 16 A. I. R. 1929 P. C. 135 : 10 Lah. 725 : 56 I. A. 201 : 117 I. C. 17 (P. C.), Mohabbat Ali Khan v. Muhammad Ibrahim Khan.



and I. L. R. (1944) Lah. 191³ vehemently contended that Ahmad Ali should have been presumed to be a legitimate son of Ghulam Jilani and it was for the plaintiff to disprove the factum of his marriage with Khurshaid Begum. It may be conceded that Ghulam Jilani had been living with Khurshaid Begum as husband and wife and that he had been acknowledging Ahmad Ali to be his son by his conduct and letters to which our attention was drawn; and although it might have been possible to raise a presumption of legitimacy in cases where the woman was not found to have been a concubine (because the ordinary presumption is that a couple who is living together as man and wife is doing so in consequence of a valid marriage and not in a state of concubinage), yet it may not be possible in this case either as regards marriage or in respect of legitimacy if Khurshaid Begum were found to have been a prostitute and to have adulterous connexion with Ghulam Jilani to start with.

[4] While dealing with a woman of this character, their Lordships of the Privy Council refused to presume in 11 M. I. A. 194⁴ "that a woman, once a concubine, had, merely by lapse of time and propriety of conduct, become a wife, and that the ordinary legal presumption was that there had been no marriage." Presumptions which might have been raised in a case where the woman was not found to be a prostitute before the alleged marriage and where connection with her was not found to be adulterous in its inception can have no bearing on a case when these facts have

been found to be established. Apart from the Anglo-Muhammadan Law or the Indian Evidence Act, the same conclusion would have to be drawn if the case were to be governed by unalloyed Muslim Law. In fact under the Shia system of law no marriage is permissible between persons who have had illicit relations. It is true that the Sunni system is not so rigid and marriage is permissible even if a connection has been adulterous at its inception. But even according to that system a marriage cannot be presumed on account of parties, subsequent conduct or by acknowledgment once it is found that the connection had been adulterous in the beginning. Prostitution as an institution never prevailed in Islamic countries; but when adultery was not countenanced and entailed very severe and even capital punishment by stoning adulterers to death, the position of a prostitute would even be worse. This austerity furnishes an additional reason for raising presumption of marriage under the Muslim Law when parties have been living as husband and wife but only when their association is not found to have been carnal before marriage. This takes me to facts which occurred subsequently.

[5] After the death of Ghulam Jilani in 1906 his estate was mutated in favour of Mt. Nawab-ul-Nisa. After the mutation had been effected in her favour to the exclusion of Ahmad Ali and Amir Ali, the two sons of Khurshaid Begum *alias* Mahbub, a suit (No. 110 of 1908) was instituted by them for the recovery of possession of the property left by Ghulam Jilani as his sons in the Court of the District Judge, Ludhiana, on 15th December 1908 (Ex. P-32). As Nawab-ul Nisa denied their legitimacy an issue was on that point expressly framed in that suit. The suit proceeded for some time when two

3. ('43) 30 A. I. R. 1943 Lah. 225; I. L. R. (1944) Lah. 191 : 209 I. C. 601, Mohammad Sadiq v. Mohammad Hassan.

4. ('66-67) 11 M. I. A. 194 (P.C.), Mt. Jariutool-Butool v. Mt. Hosseinee Begum.

documents (Exs. P-30 and P-31) were executed by Ahmad Ali on 29th November 1909. By means of Ex. P-30, a deed of relinquishment by Ahmad Ali in favour of Nawab-ul-Nisa, the former relinquished his claim against the property left by Ghulam Jilani. He admitted in this document that his mother, Mt. Mahbubun, had not been married to Colonel Ghulam Jilani and had lived in his house without any marriage. It was also admitted by Ahmad Ali that his mother was a *twaiif* (prostitute) and he had, therefore, called himself to be a *mirasi* by caste. This document was duly executed and presented for registration on 29th November 1909. An application was made by Ahmad Ali to the Court of the Subordinate Judge, Ludhiana, before whom the suit was pending in which the admissions made by him in the deed of relinquishment were repeated. But as he was only one of the two plaintiffs the suit went on and was decreed by the Subordinate Judge on 22nd December 1909 (Ex. P-56) to the extent of half of the property in dispute in favour of his other brother Amir Ali who was found to be a legitimate son of Ghulam Jilani. Ahmad Ali's suit was, however, dismissed in view of his withdrawal.

[6] An appeal against this decision was preferred by Mt. Nawab-ul-Nisa to the Punjab Chief Court. It was compromised and Amir Ali also executed a deed of relinquishment in favour of Nawab-ul-Nisa on 30th January 1912 (Ex. P-37) and made an application to the Punjab Chief Court on the following day. Nawab-ul-Nisa's appeal was accordingly allowed. In this deed of relinquishment (Ex. P-37), Amir Ali also admitted that he was not a legitimate son of Ghulam Jilani and that he was not, therefore, entitled to the latter's property. He also admitted that the claim brought by him was a false one and that the suit had been instituted with the object of receiving cash from Nawab-ul-Nisa and the other relatives of Col. Ghulam Jilani. It is quite true that admissions of this kind are not conclusive but if made by persons against their own interests, as they were in that case, they may be accepted as true unless shown to be otherwise. And the burden of proving them to be incorrect would lie on those who made them or on those who subsequently came to stand in their shoes. Nothing has been said or shown in the present case which would throw any doubt on the truth of the admissions made by Ahmad Ali and Amir Ali and in the absence of any

such allegation or proof they can safely be acted upon. They must, therefore, be regarded to raise a strong piece of evidence against the alienee-defendants who now wish to establish Ahmad Ali's title to the property left by Ghulam Jilani. It may be, however, observed that Ahmad Ali did not assail the correctness of the admissions made by him in two formal documents but admitted in the suit out of which this appeal arises that he did not lay any claim to the property in dispute. On the other hand, he challenged the validity of the alienations made by him in favour of the appellants.

[7] After the suit No. 110 of 1908 had been finally decided against Ahmad Ali and Amir Ali, a suit (No. 138 of 1912) was instituted by Khurshaid Begum against Nawab-ul-Nisa on 25th March 1914 in the Court of the Additional District Judge at Ludhiana on the ground that she was a widow of Ghulam Jilani. Ahmad Ali and Amir Ali were impleaded as defendants in this suit. Khurshaid Begum was found to be a widow of Ghulam Jilani but her suit was nevertheless dismissed as she was held not entitled to succeed to his property on the ground of custom, which debarred a woman of any caste other than the one to which Ghulam Jilani had belonged, to inherit his property (Ex. P-36). Khurshaid Begum appealed against this decree to the District Judge, Ludhiana. The appeal was allowed on 3rd December 1914 and Khurshaid Begum's suit was decreed (Ex-D-11). Nawab-ul-Nisa then appealed against the decree to the Punjab Chief Court and the decision of the lower appellate Court was set aside on 2nd January 1917 (Ex. P 53) on the ground that the District Judge had no jurisdiction to hear the appeal. The appeal was, therefore, ordered to be returned to Khurshaid Begum for presentation to the proper Court. Khurshaid Begum consequently filed the appeal in the Chief Court on 27th March 1917. This resulted in a compromise. The compromise has not been produced on the record. Nor have we been able to find it on the original record of that case. But an order by the Punjab Chief Court of 24th April 1917 has been printed. It is Ex. P-35. It was admitted before the learned Judge on behalf of Mt. Khurshaid Begum that she was not entitled to succeed as an heir of Ghulam Jilani and that she and her daughter Mt. Ahmadi Begum, who were co-plaintiffs in that case, would only be entitled to claim suitable maintenance out of the estate of Altaf Ali. It is not quite clear from the order whether this claim to maintenance

was decreed on the ground of Khurshaid Begum being a permanently kept mistress of Ghulam Jilani or as his widow. But the fact remains that it was clearly conceded on behalf of Khurshaid Begum that she would not be entitled to succeed as an heir to Ghulam Jilani.

[8] Imam Ali died in 1918 and his estate was mutated in favour of Altaf Ali and Abdul Majid, and Ahmad Ali, Amir Ali or Khurshaid Begum were not recognised to be his heirs as they should have been if they were the legitimate wife and children of Ghulam Jilani. Indeed, they had not even claimed to be heirs to this property. Nawab-ul-Nisa died on 1st December 1928 and on her death the whole of the property which was in her possession was mutated in favour of Altaf Ali. Even then no claim was made on behalf of Amir Ali or Ahmad Ali or their mother to Ghulam Jilani's estate and the whole of the property was mutated in favour of Altaf Ali. Altaf Ali himself died on 8th May 1930.

[9] Seven suits were instituted by Abdul Majid and Altaf Ali to challenge the alienations made by Mt. Nawab-ul-Nisa between 1921 and 1934 (Exs. P-17, P-21 to P-23 and P-25 to P-27). Ahmad Ali did not take any interest in these suits. He would have been the nearest reversioner to contest the alienations, if he had claimed to be Ghulam Jilani's son. One of these suits, in which Ghulam Jilani's succession was in dispute, was instituted by Abdul Majid against persons most of whom are appellants in this case. Ahmad Ali made an application to be impleaded as a defendant. But out of the appellants, Bisakhi, Barkat and Ahmad Khan actually contested this application. It was not allowed and Ahmad Ali took no further steps to establish his parentage. After Altaf Ali's death the property was mutated by the revenue authorities in favour of Ahmad Ali and this in spite of Ahmad Ali's application (Ex. P-89), dated 15th March 1937, in which he had stated that he did not claim any of the properties which are now in dispute. The matter went up to the Commissioner, Jullundur. Ahmad Ali made another application to him on 3rd November 1937, (Ex. P-63), disclaiming any share in the property in dispute which had been ordered to be mutated in his favour by the revenue officer. No heed was, however, paid to this application and the order was confirmed on appeal.

[10] Ahmad Ali made five alienations between November 1934 and September 1939

(Exs. D-2, D-4, D-3, D-12 and D-1) in favour of various persons who were defendants in the present litigation. Nine of these are the appellants before us. They claim their title through Ahmad Ali. As to the question of Ahmad Ali's legitimacy I have already referred in detail to the fact that Ahmad Ali had admitted as early as November 1909 in unambiguous terms that he was not the legitimate son of Ghulam Jilani and that his mother Mahbubani who was a prostitute had not been married to the latter. The statements made by Ahmad Ali in the deed of relinquishment (Ex. P-30) and in the application for withdrawal from the suit (Ex. P-31) were consistent with the whole of his conduct throughout except in regard to the five alienations made by him between 1934 and 1939. Even during this period he had, as I have already observed, twice stated before the revenue authorities that he did not wish to contest Abdul Majid's application for mutation of his (Abdul Majid's) name in the mutation register. This was in November 1937 (Ex. P-63 and P-84). As by then four out of the five alienations had been effected, it may be legitimately contended on behalf of the alienees that these statements were not relevant against them. It cannot be, however, overlooked that these alienations are, as I shall show later, themselves without any consideration and Ahmad Ali was induced to effect them as either he was, as suggested by him, duped by the alienees or perhaps with the object of creating evidence of legitimacy in his own favour. In any case, the statements made by Ahmad Ali in his application are not only consistent with his entire conduct but corroborate the statement which he had made in two solemn documents (Exs. P-30 and P-13).

[11] Learned counsel for the appellants contended that the burden of proving Ahmad Ali's illegitimacy should have been placed on the plaintiff-respondent, particularly when it may be taken to have been established that he was born of Ghulam Jilani's loins. The question of onus is of no or very little importance at this stage as the parties have led all the evidence which they wished to adduce in support of their respective contentions. Nor can I forget the fact that it is now for the appellants to show that the judgment of the trial Court is wrong and not for the respondents to establish its correctness. But apart from these considerations the onus should have been and was rightly placed in my view on the appellants

as the admissions made by Ahmad Ali in November 1909 were before the Court at the time when the issues were being framed and the Court could have legitimately taken them into consideration for the purpose of framing issues in the suit. That was admitted by Ahmad Ali to be true in 1909 was rightly presumed to be true unless the admissions were shown by those who wished to challenge their correctness to be untrue or at least to have been made in such circumstances as to render them ineffectual or innocuous. No attempt was made by the appellants or the alienee defendants to establish that the admissions made by Ahmad Ali were in fact untrue. Nor was any effort made to prove any circumstance by which they could have hoped to get rid of their effect. Ahmad Ali's brother Amir Ali, who had succeeded on the question of legitimacy in the trial Court himself admitted in the deed of relinquishment executed by him on 30th January 1912 (Ex. P-37) and in his application for withdrawal put in before the learned Judges of the Punjab Chief Court on 31st January 1912 (Ex. P-34) that he was not the legitimate son of Ghulam Jilani.

[12] The suit instituted by Mt. Khurshaid Begum was ultimately compromised before the Punjab Chief Court. She had succeeded in establishing before the trial Court that she was a widow of Ghulam Jilani but when the matter came up in appeal she agreed to accept maintenance alone and the decree passed by the trial Court was modified accordingly. It is not possible to say in the absence of any documentary evidence on the record (either on the present record or even in the record in which the compromise had been effected as we had sent for the original record and seen for ourselves that there was no application on behalf of Mt. Khurshaid Begum on the record of that case) as to what had led Mt. Khurshaid Begum to agree to accept maintenance when she would have been entitled to recover it both as a permanent concubine of Ghulam Jianli or as his widow. All that can be possibly said in favour of the appellants is that the decision of that suit does not show that Khurshaid Begum was not the legally wedded wife of Ghulam Jilani. But it is equally consistent with her not being a widow of Ghulam Jilani and all that may be said is that the result of that litigation is inconclusive and cannot lead to any conclusion either way.

[13] The oral evidence led on behalf of the appellants to prove Khurshaid Begum's

marriage is wholly unreliable. Only four witnesses were examined before the trial Court, D. Ws. 1, 2, 6 and 11. Out of these, D. W. 6 is Ahmad Ali himself and D. W. 11 is one of defendant appellants, who had no personal knowledge of the marriage. The statements of other two witnesses cannot be accepted as for one thing they were boys of tender age at the time when the marriage is said to have taken place and there is no reason to believe that such boys could have been invited by Ghulam Jilani to a second marriage in which he was alleged to have entered. The other four statements on which reliance was placed were given by persons who were proved to have been dead and which they had made in earlier litigation between the parties. They are Exs. D-8, D-9, D-6 and D-5. Having gone through these statements I find that they are equally unreliable. Sultan Bakhsh (Ex. D-8) was a tailor and it is not possible to believe that he would have been invited to attend a second marriage of Colonel Ghulam Jilani. His own statement, however, is inconsistent. In one place he stated that he was present but admitted in cross-examination that he was not actually present at the place where the *nikah* had taken place but was standing outside the house. The statement of Mirza, who was a harness-maker, carries no conviction. The other two statements are also valueless. There is nothing to show in Ex. D-6 that an opportunity had been given to the other side for cross-examining the witness. Imdad Ali does not say anything about marriage at all.

[14] Some reliance was placed by learned counsel for the appellants on the evidence of acknowledgment by Ghulam Jilani. But while acknowledgment may be good evidence of a legal marriage in cases where marriage can be safely presumed it cannot be held so to be in the absence of any satisfactory and legal evidence of marriage in cases where the woman is found to be a prostitute and where the connection is found to have been adulterous in its inception. Acknowledgment may be evidence of a legal marriage in certain circumstances but it does not legitimize any person where a marriage between his parents cannot be in the circumstances presumed. The decision therefore of the Full Bench of the Allahabad High Court in 10 ALL. 289⁵ on which reliance was placed by learned counsel for the appel-

5. ('88) 10 All. 289 (F.B.), Muhammad Allahabad Khan v. Muhammad Ismail Khan.

lants has no application. That Ghulam Jilani's connection with Mt. Khurshaid Begum was adulterous to start with had to be admitted by the witnesses for the appellants themselves. As for the fact that Mt. Khurshaid Begum was a prostitute it was not seriously denied but, in any case, it was admitted by Ahmad Ali in his deed of relinquishment (Ex. P-30) and in his application for withdrawal (Ex. P-31), where he admitted his own caste to be *mirasi* and not a Rajput which Ghulam Jilani was and which would have been his caste if he had alleged himself to be a legitimate son of Ghulam Jilani. On the evidence led in this case it is impossible to hold that Ghulam Jilani's marriage with Mt. Khurshaid Begum was proved or to hold that Khurshaid Begum was not a prostitute and that Ghulam Jilani had no illicit connection with her for some time before the alleged marriage. The whole of the evidence in the case, documentary, oral and circumstantial, leads to an irresistible conclusion that Ahmad Ali was the illegitimate son of Ghulam Jilani and I would, therefore, affirm the finding of the trial Court on that point.

[15] As to whether the alienations in favour of the appellants were for consideration, no evidence had been led by them to prove it. Learned counsel for the appellants, however, contended that the onus of proving want of consideration in the presence of registered documents, containing recitals of the receipt of consideration, should have been placed on those who had denied it. He overlooked the fact, however, that the consideration was being denied not by a person who was a party to those documents or transactions but by a third party who is claiming independently. Moreover, the circumstances of the case are such as may reasonably lead one to infer that all these documents were executed without any consideration. Ahmad Ali was either duped as he says in his evidence, or was trying to bring certain documents into existence in order to show that he had some kind of title to the property. But he was found to have none and the alienees apparently entered into a speculative transaction with full knowledge of all the facts and possibly in the hope that they might succeed in persuading the Courts to raise a presumption in favour of Ahmad Ali's legitimacy. For the above reasons I would dismiss this appeal with costs.

Mahajan J.—I agree.

D.S./D.H.

Appeal dismissed.

[Case No. 87.]

A. I. R. (33) 1946 Lahore 456

MARTEN AND BHANDARI JJ.

Emperor

v.

Mohammad Shah — Respondent.

Criminal Appeal No. 1085 of 1944, Decided on 13th November 1945, from order of Magistrate, 1st Class, Rawalpindi. D/- 12th September 1944.

Criminal P. C. (1898), S. 165 (as amended in 1923) — S. 165 is mandatory—Non-compliance with its provisions is not cured by S. 99, Penal Code.

The simple safeguards incorporated by the Legislature in Section 165, Criminal P. C., are mandatory, not directory, and must be carried out immediately and fully, or as nearly so as they can be in the exigencies and circumstances of each case. Thus, the reasons recorded for the search should be sent to the Magistrate at once, though it is not necessary that they should be in the hands of the Magistrate before the search is carried out : 39 Cal. 953 (P C); 36 Cal. 433; ('26) 13 A. I. R. 1926 Cal. 663; ('35) 22 A. I. R. 1935 Nag. 237 and ('43) 30 A. I. R. 1943 Lah. 28, *Rel. on*; ('24) 11 A. I. R. 1924 Cal. 1, *Ref.*

[P 458 C 2; P 459 C 1]

Unless this is done the search is without jurisdiction and bad in law. Section 99, Penal Code, will in no way cure this, for the police officer who carries out a search under S. 165, Criminal P. C. without complying with its requirements, which are intended to be mandatory is acting without due care and attention: ('35) 22 A. I. R. 1935 Nag. 237 and ('44) 31 A. I. R. 1944 Pat. 228, *Rel. on*.

[P 458 C 2; P 459 C 1]

Cr. P. C. —

('41) Chitaley, S. 165, Ns. 8, 14 and 18.

('41) Mitra, S. 165, P. 542, N. 525a.

Penal Code —

('45) Ratanlal, S. 99, P. 207, Pt. 2.

('36) Gour, S. 52, P. 211, N. 362, Pt. 19.

Basant Krishan Khanna, Advocate General

— for the Crown.

S. M. Sikri as amicus curiae

— for Respondent.

Marten J. — This is an appeal by the Crown against the acquittal by Mr. S. P. Jain, Magistrate 1st Class, Rawalpindi, of the respondent Mohammad Shah who had been charged under S. 353, Penal Code, for assaulting a public servant, Pandit Kesri Chand, Inspector Police, with intent to prevent him from discharging his duty as such.

[2] The facts found against the respondent are simple. On 18th November 1943 Pandit Kesri Chand searched village Dhok Mohammad Shah and amongst the other houses searched was that of the respondent. When the police entered the house the respondent resisted them violently striking at them with his *dang*. In spite of repeated warnings he persisted in this violent attitude and

actually struck the lambarlar a blow with his weapon and attempted to do the same to the Inspector whereupon the latter fired at him with his pistol wounding him in the legs. The respondent continued to show fight until he succumbed to bleeding as a result of this wound. First aid was rendered and he was subsequently challaned. The learned Magistrate at the trial found these facts conclusively proved and convicted him. On appeal to the learned Sessions Judge, it was urged that the Inspector, Pandit Kesri Chand, had not followed the provisions of S. 165, Criminal P. C. in that he had not previously recorded in writing the reasons for this search which was carried out without a warrant from any Magistrate and he had not sent a copy of these reasons to the nearest Magistrate. The learned Sessions Judge set aside the conviction and sentence and remanded the case to the trial Court for fresh enquiry on these points.

[3] The trial Court having enquired into the matter found that neither of the above-quoted provisions of this section had been complied with. It further found that failure to comply with these provisions which were mandatory, rendered the search of the house of the respondent illegal therefore, no conviction under S. 353 could be maintained even on the facts found. The learned Magistrate acquitted the respondent.

[4] Before us the Crown has been represented by the learned Advocate-General and the respondent by Mr. S. M. Sikri. The learned Advocate-General has admitted that the two provisions of S. 165 above quoted had not been properly complied with, i. e., (i) neither the officer-in-charge of the police station nor the police-officer actually making the investigation had recorded in writing the grounds on which he believed the search to be necessary and the things which he hoped to recover thereby and (ii) the provisions of sub-s (5) that copies of such record should be sent forthwith to the nearest Magistrate, were not complied with. As regards the first, he has pointed out that some police officer did record in the *zimmis* the reasons for the search, but it is clear that it was neither the Station House Officer or Pandit Kesri Chand who did so. As regards the second no attempt was made to send any such record to any Magistrate prior to the search. Learned Advocate-General has, however, argued that these provisions are merely directory and not mandatory and that although "failure to carry them out undoubtedly amounted to a legal irregularity yet the search itself was

not rendered illegal thereby. He has argued that it was clearly the duty of the police officer to carry out the search if he considered, *bona fide*, that there were reasonable grounds for supposing that the search would reveal stolen property and that it was further necessary to carry it out immediately, thereby making it impossible for the usual procedure of obtaining a search warrant to be followed. He contends that provided it is shown beyond doubt that the motive and actions of the searching officer were *bona fide* in these respects, the mere fact that he failed to record his reasons and notify a Magistrate in the manner provided by the section, was not intended by the Legislature to prevent the officer from carrying out what was otherwise his express duty. In support of this contention, he relied chiefly on the authority cited in 51 Cal. 1¹ and also a Single Bench authority of this Court published in A. I. R. 1939 Lah. 280.² He has also quoted A. I. R. 1929 ALL 937³ and a number of authorities both of this country and of the English Courts explaining the circumstances in which the word 'shall' appearing in a statute may be interpreted as directory instead of mandatory. He has further urged that even if the decision of the lower Court on the validity of the search under S. 165, Criminal P. C., is correct, the respondent should still be convicted of assault, for S. 99, Penal Code specifically provides that "there is no right of private defence against an act which does not reasonably cause the apprehension of death or of grievous hurt if done, or attempted to be done, by a public servant acting in good faith under colour of his office, though that act may not be strictly justifiable by law."

[5] In my view the preliminary compliance with all the provisions of S. 165, Criminal P. C., is undoubtedly necessary before a search under that section can legally be carried out. As stated by their Lordships in the Full Bench decision published in 51 Cal. 1,¹ the question whether certain statutory provisions are meant to be directory or mandatory depends on the intention of the Legislature in enacting them and this should be judged from the provisions in question and the Act as a whole.

1. (24) 11 A. I. R. 1924 Cal. 1 : 51 Cal. 1 : 75 I. C. 129 (F.B.), Government of Assam v. Saheb-ulla.

2. (39) 26 A. I. R. 1939 Lah. 280 : 184 I. C. 6, Mungul Singh v. Ghulam Mohammad.

3. (29) 16 A. I. R. 1929 All. 937 : 120 I. C. 266, Rure Mal v. Emperor.

[6] A perusal of the general provisions contained in Chap. VII, Criminal P. C., as regards search and entry, clearly discloses that it was the undoubted intention of the Legislature to preserve the common right of privacy by requiring that no such entry or search should be conducted without the written order of a Court. These provisions are based on the law of England where an Englishman's house is said to be regarded as his castle and cannot be easily invaded even by the Forces of the State. Similar safeguards are even more necessary in this country where an Indian's house is also his *zenana*, in which his womenfolk, who by custom must be protected from the gaze of strangers should find safe asylum and refuge. Section 165, Criminal P. C., was enacted as an exception to the general law of searches because it was recognised that in certain exceptional emergencies it was necessary to empower responsible police officer to carry out searches without first applying to the Courts for authority. But it was clearly the intention of the Legislature that the powers under this section should be limited and restricted and that those members of the general public against whom they were to be applied should be provided with safeguards in order to prevent abuse of these powers. It was for that reason that it was laid down that the reasons for the emergency use of the powers provided by this section should be recorded in writing and, further, that a copy should be sent to the nearest Magistrate forthwith, so that if the search was unlawfully carried out there should be material evidence available to the person adversely affected whereby he could establish his claim for redress. Should it now be held that a search can be carried out under S. 165, Criminal P. C., before the safeguards have been complied with, it appears to me that the safeguards themselves would be to a large extent vitiated and the power conferred by the section open to abuse. In my view, the Legislature did intend that in all cases reasons for the search should be recorded and sent to the nearest Magistrate before the search is carried out. I do not mean that they should be in the hands of the Magistrate before the search is carried out, but they should certainly be sent to him at once. It seems to me that sub-s. (5) of this section, which has been added by an amending Act in 1928, puts the imperative nature of the provisions as a whole, beyond doubt.

[7] In this case, had the reasons for the

search been properly recorded and sent to the Magistrate at once I would not have held that the search was invalid merely because they had not been recorded either by the officer-in-charge of the police station or the officer actually making the investigation. But in view of the fact that they were only recorded in the *zimni*, which is a secret document not open to inspection by the public, and were never sent to any Magistrate prior to the search, I have no doubt that the intention of the Legislature has been violated. In this I am supported by the opinion of the Calcutta High Court viz., 39 Cal. 953,⁴ 36 Cal. 433⁵ and A. I. R. 1926 Cal. 663;⁶ also by the Nagpur Judicial Commissioner in A. I. R. 1935 Nag. 237,⁷ and finally by this Court in a Division Bench ruling published in A. I. R. 1943 Lah. 28⁸ with which I most respectfully and completely agree.

[8] Coming now to the provisions of S. 99, Penal Code, it will be observed that this exception only applies if the public servant is acting "*in good faith*" under the colour of his office. Section 52, Penal Code, provides that nothing is said to be done or believed in "*good faith*" which is done or believed without due care and attention. Senior police officers must be presumed to know the law under which they act, more especially if they are making use of an emergency section. It is difficult, therefore, to say that a police officer who carries out a search under S. 165, Criminal P. C., without complying with the safeguards incorporated in that section, which were undoubtedly intended by the Legislature to be mandatory, is acting with due care and attention. It was held in A. I. R. 1935 Nag. 237⁷ that this could not be so, and this was followed in 45 Cr. L. J. 802⁹ (Patna) and in other rulings of a similar nature.

[9] In my view, therefore, there is no force in this appeal. The simple safeguards incorporated by the Legislature in S. 165, Criminal P. C. are mandatory, not directory, and must be carried out immediately

4. ('12) 39 Cal. 953; 39 I. A. 163; 16 I. C. 501 (P. C.), *Clarke v. Brojendra Kishore Roy Choudhuri*.

5. ('09) 36 Cal. 433; 2 I. C. 436, L. O. *Clarke v. Brojendra Kishore Roy Choudhuri*.

6. ('26) 13 A. I. R. 1926 Cal. 663; 93 I. C. 1038, *Lal Mea v. Emperor*.

7. ('35) 22 A. I. R. 1935 Nag. 237; 31 N. L. R. Sup. 66 160 I. C. 306, *Hiralal v. Ram Dulare*.

8. ('43) 30 A. I. R. 1943 Lah. 28; 1 L. R. (1943) Lah. 805; 204 I. C. 535, *Durga Das v. Emperor*.

9. ('44) 31 A. I. R. 1944 Pat. 228; 23 Pat. 328; 215 I. C. 102; 45 Cr. L. J. 802, *Ram Parves Ahir v. Emperor*.

and fully, or as nearly so as they can be in the exigencies and circumstances of each case. Unless this is done the search is without jurisdiction and bad in law. Section 99, Penal Code, will in no way cure this. I would, therefore, dismiss this appeal.

[10] **Bhandari J.**—I agree with what has been said by my learned brother and will add a few words of my own only because the case involves an encroachment on the rights of the subject.

[11] In (1765) 19 St. Tr. 1029¹⁰ which is usually regarded as settling the common law as to general search of premises Lord Camden C. J. observed as follows:

"The great end, for which men entered into society, was to secure their property. That right is preserved sacred and incommunicable in all instances, where it has not been taken away or abridged by some public law for the good of the whole. The cases where this right of property is set aside by positive law, are various. Distresses, executions, forfeitures, taxes, &c., are all of this description; wherein every man by common consent gives up that right, for the sake of justice and the general good. By the laws of England, every invasion of private property, be it ever so minute, is a trespass. No man can set his foot upon my ground without my licence, but he is liable to an action, though the damage be nothing: which is proved by every declaration in trespass, where the defendant is called upon to answer for bruising the grass and even treading upon the soil. If he admits the fact, he is bound to show by way of justification, that some positive law has empowered or excused him. The justification is submitted to the Judges, who are to look into the books; and if such a justification can be maintained by the text of the statute law, or by the principles of common law. If no such excuse can be found or produced, the silence of the books is an authority against the defendant, and the plaintiff must have judgment."

[12] In the absence of any general right of search or seizure, which could not be maintained in the face of (1765) 19 St. Tr. 1029¹⁰ it was clearly the duty of the police officers concerned to show the law which justified their entry into the house of the respondent for the purpose of making a search. They rely on the statutory right conferred upon them by S. 165, Criminal P. C. This section creates a statutory exception to the general rule that no search can be made without a warrant from the appropriate Magistrate. The Legislature which has with so much circumspection conferred such wide powers on the police has in its wisdom taken care to provide certain safeguards for the protection of the public. It empowers a police officer to make a search only if he has reasonable grounds for believing that anything necessary for the purpose of investi-

gation may be found in any place within the limits of the police station of which he is in charge and only if in his opinion it cannot be otherwise obtained. It requires him to record in writing the grounds of his belief that the search is necessary and to specify in such writing the thing for which the search is to be made. It requires him to send forthwith to the nearest Magistrate copies of any records made by him under sub-s. (1) or sub-s. (3) of S. 165. These conditions were imposed by the Legislature with the obvious intention of protecting the innocent from undue interference by the police.

[13] Having regard to the language of S. 165 and the general object intended to be secured by that section I have no doubt in my mind that it must be deemed to be obligatory with an implied nullification for disobedience. It follows as a consequence that compliance with the terms of the section is a condition precedent to the validity and legality of the search.

[14] I concur in the order proposed.

B.P./V.B.

Appeal dismissed.

[Case No. 88.]

A. I. R. (33) 1946 Lahore 459

KHOSLA J.

Emperor

V.

Ch. Raghunath Singh and others — Respondents.

Civil Revn. No. 375 of 1945, Decided on 19th October 1945, from order of Senior Sub-Judge, Kangra at Dharamsala, D/- 21st April 1945.

Evidence Act (1872), Ss. 123 and 162—Privilege under S. 123 — Unpublished official records — *Ipse dixit* of head of department that documents relate to affairs of State is conclusive.

Under S. 123 the privilege can only be claimed in respect of unpublished official records and once it is held that the documents are unpublished official records the statement of the Head of Department that they relate to affairs of State is conclusive and the Court can hold no further enquiry into the matter for the simple reason that the Court is precluded from examining the document. But the question whether a document relates to affairs of State for the purposes of Ss. 123 and 162, Evidence Act, presupposes that it is an unpublished official record. The question of publication is always relevant in cases arising under S. 123.

[P 461 C 1, 2; P 462 C 1]

A *zaildar* brought a suit against the Superintendent of Police for a libellous statement alleged to have been recorded by him in the *zaildari* book of the plaintiff. Originally this book was in the possession of the *zaildar*. Before filing this suit he had made an application to the Collector for the

10. (1765) 19 St. Tr. 1029; 95 E. R. 807, *Entick v. Carrington*.

deletion of such remark accompanied by the *zaildari* book. The plaintiff summoned the Deputy Commissioner asking him to produce in Court his *zaildari* file, *zaildari* book, and the application made by him. The Deputy Commissioner appeared in Court with these documents but produced an order by the Commissioner claiming privilege in respect of these documents under S. 123, Evidence Act:

Held that the *zaildari* file was an unpublished official record and was privileged under S. 123; the Commissioner's statement that it related to affairs of State was therefore enough, but the *zaildari* book and the application could not in their very nature be called unpublished official records and the privilege in respect of these documents could not be claimed: ('44) 31 A.I.R. 1944 Lah. 209; ('44) 31 A. I. R. 1944 Lah. 434; 1942 A. C. 624 and ('43) 30 A.I.R. 1943 Cal. 539, *Rel on.*

[P 461 C 2; P 462 C 1]

B. K. Khanna, Advocate-General—

for the Crown.

*R. L. Ananda Rattan Lal Chawala, and Y. P. Gandhi—*for Respondents 1 to 3, 6 and 5, respectively.

S. M. Sikri for Hallows.

Order. — Ch. Raghunath Singh Zaildar and two other persons brought a suit against Mr. H. C. Hallows, Superintendent of Police, Kangra, for the recovery of a sum of Rupees 50,000 on account of damages in respect of a libellous statement alleged to have been recorded by Mr. Hallows in the *zaildari* book of Ch. Raghunath Singh. Two other suits in respect of the same libellous statement were also brought by the relations of Ch. Raghunath Singh against Mr. Hallows. The total sum claimed in the three suits was Rs. 72,000

[2] The *zaildari* book in which the libellous statement was recorded was originally in possession of the zaildar. Before filing the suit, he made an application to the Collector of the District praying for the deletion of remarks. The application was accompanied by the *zaildari* book. The Collector gave the zaildar receipt for the *zaildari* book.

[3] During the proceedings of the case the plaintiffs summoned the Deputy Commissioner of Kangra and asked him to produce, (1) the *zaildari* file of Ch. Raghunath Singh, (2) the *zaildari* book in which the libellous statement was recorded by Mr. Hallows, and (3) the application of Ch. Raghunath Singh asking for the deletion of the remarks to which a reference has been made by me above.

[4] The Deputy Commissioner appeared in Court with these three documents but he produced an order signed by the Commissioner, Jullundur division, claiming privilege under S. 123, Evidence Act. The relevant portion of this order is in the following terms:

"(b) I withhold permission to give any evidence derived from these documents or from any

photographs or other reproductions thereof and claim privilege for them in accordance with the provisions of S. 123, Evidence Act, 1872.

It should be represented to the Court that the *zaildari* file and book and the application of Ch. Raghunath Singh contain unpublished official records relating to affairs of State for the purpose of S. 123, and that in view of the provisions of S. 162, Evidence Act, the file and the book and the application are not open to the inspection of the Court."

[5] This objection was allowed in respect of the *zaildari* file. The learned trial Judge, however, held that no such privilege could be claimed in respect of the *zaildari* book and the application made by the zaildar. The Crown has moved this Court on the revision side with a prayer that the order of the learned Senior Subordinate Judge be set aside on the ground that the *zaildari* book and the application are protected by the provisions of S. 123, Evidence Act.

[6] The argument of the learned Advocate-General before me is that the *zaildari* book and the application made by the zaildar are unpublished official records relating to affairs of State and that, therefore, no one can be permitted to give evidence derived from these documents except with the permission of the head of department. He further argues that the Court is precluded from looking at these documents in order to determine the question of privilege by virtue of S. 162, Evidence Act. He maintains that the zaildar is an official and that the *zaildari* book in his possession is an unpublished official document. The application which he made to the Collector is also an unpublished official document, and that being so, the head of department can, if he thinks fit, withhold his permission under the provisions of S. 123, Evidence Act. Reliance is placed upon two Division Bench rulings of this Court in A. I. R. 1944 Lah. 209¹ and A. I. R. 1944 Lah. 434.² The learned Advocate General also referred to a decision of the House of Lords in (1942) 166 L. T. 366.³

[7] It is argued on the other hand that a zaildar is not an official in the ordinarily understood meaning of the word and the *zaildari* book which is in his possession is merely a record of more or less complimentary notes which are recorded by the local officers whom the zaildar visits. The zaildar is entitled to obtain copies of these

1. ('44) 31 A. I. R. 1944 Lah. 209 : 216 I. C. 89; I. M. I. all v. Secy. of State.

2. ('44) 31 A. I. R. 1944 Lah. 434 : I.L.R. (1945) Lah. 219, Nazir Ahmad v. Emperor.

3. (1942) 1942 A. C. 624 : 111 L. J. K. B. 406 : 166 L. T. 366 : (1942) 1 All E. R. 587, Duncan v. Cammell, Laird & Co., Ltd.

notes and to publish them as widely as he likes. These notes can hardly be said to be official records and they are certainly not unpublished. The application which the zaildar made also cannot be said to be an official record and it was in no way intended to be confidential. Therefore (it was argued) the main essentials which invest a document with the privilege contemplated by the provisions of S. 123, Evidence Act, do not obtain and the document can be produced and inspected by the Court and evidence from it can be given without the permission of the Commissioner of the Division.

[8] In A. I. R. 1944 Lah. 209¹ the plaintiff presented an application for the discovery and production of certain documents in possession of the Chief Secretary to Government, Punjab. The documents were admittedly unpublished official records. The Chief Secretary claimed privilege in respect of these documents and supported the claim by means of two affidavits sworn by him. Abdul Rashid J. remarked in his judgment:

"So far as the Indian Courts are concerned there is overwhelming authority for the proposition that in respect of State documents it is not open to the Court to scrutinize the documents in order to determine the validity of the claim of privilege."

[9] The privilege claimed by the Chief Secretary was in that case upheld. It is clear, however, from the remark quoted by me above and from the perusal of the judgment that the documents in respect of which the privilege was claimed were admittedly unpublished official records. In such a case the *ipse dixit* of the head of department would be conclusive and the Court would be bound to uphold the privilege claimed.

[10] In A. I. R. 1944 Lah. 434² also the privilege was claimed by the Chief Secretary to Government, Punjab, in regard to certain documents which were in his possession. A Division Bench of this Court held that the claim must be upheld. The judgment, however, made it quite clear that privilege can only be claimed in respect of unpublished official records, and once it is held that the documents are unpublished official records the statement of the head of department that they relate to affairs of State is conclusive and the Court can hold no further enquiry into the matter for the simple reason that the Court is precluded from examining the document.

[11] In this case, a reference was made to a Calcutta ruling reported in A. I. R. 1943 Cal. 539³. Abdur Rahman J. dissented from the 4. ('43) 30 A. I. R. 1943 Cal. 539: 209 I. C. 124, *Ijjatali Talukdar v. Emperor*.

observations made by Dass J. in the Calcutta case but it is clear that where a document in respect of which privilege is claimed is not an official document or is not an unpublished document the question whether it relates to affairs of State or not does not even arise. It was argued before me that the Head of Department is entitled to claim privilege even capriciously. There is no doubt that if the document which he is asked to produce is an unpublished official record he can even falsely state that the document relates to affairs of State and in such a case the Court is bound to uphold the privilege claimed for the Court is prevented from looking at the document in order to see if the claim is made rightly or wrongly. But the question of whether a document relates to affairs of State for the purposes of Ss. 123 and 162, Evidence Act, pre-supposes that it is an unpublished official record. The concluding paragraph of the judgment of Abdur Rahman J. contains the following remarks:

"This, in my opinion, clinches the matter and puts it beyond any doubt that the privilege when claimed on the ground that the document relates to the affairs of State has got to be allowed."

[12] It is clear that the zaildari file in respect of which privilege has been upheld by the trial Court is an unpublished official record and the statement of the Commissioner that it relates to the affairs of State is enough and, in the words of Abdur Rahman J. 'clinches' the matter. But this reasoning cannot be applied to the zaildari book and the application of the zaildar which are clearly not unpublished official records.

[13] It is not necessary for the Court to examine the contents of these documents in order to come to this conclusion. It is clear that the zaildari book and the application cannot in their very nature be called unpublished official records. The zaildar is not an official in the ordinarily understood meaning of this word and the book which he holds, although not his own property, is not an official record. The rules relating to zaildari books are set out in para. 348 of Douie's Punjab Land Administration Manual. This rule allows a zaildar to obtain copies of the remarks made by the officers in his book for his own use and he can, if he likes, have these remarks printed and circulate them to members of the public. The remarks are not confidential and there is nothing in the rules preventing a zaildar from showing his zail book to any one he likes. In fact, these zail books are frequently shown not only to officers but to

members of the public with the object of self glorification. In the present case, the remarks were seen by several persons and the learned trial Judge has found that L. Nagin Chand Advocate, Ch. Munshi Ram Lambardar and L. Churanji Lal (P. W. 9) saw the remarks in question. The application which the zaildar filed also cannot be said to be an unpublished official record. It was merely an application made by a zaildar to the Collector asking the latter to delete certain remarks entered in his book. Such an application does not fall within the ambit of S. 123, Evidence Act.

[14] The question of publication was raised in (1942) 166 L. T. 366.³ It was argued that the document in respect of which privilege was claimed had been circulated. Their Lordships, however, held that the circulation was limited and did not amount to publication. It is, therefore, clear that the question of publication is always relevant in cases arising under S. 123, Evidence Act, and in the present case, the zaildari book and the application cannot be said to be unpublished official records.

[15] I, therefore, hold that no privilege in respect of these documents can be claimed. The claim made by the Commissioner could only have been made in the case of unpublished official documents and cannot be made in respect of any documents which may come into his possession. The Head of Department may be the final Judge as to whether a certain document does or does not relate to matters of State but he cannot be the final Judge as to whether the document has been published or not and whether it is official or not. For instance, he cannot claim such a privilege in respect of a book which has been published and is available in the market. To take another example, suppose the Information Department issues a certain communique to the press. The communique relates to matters of State. After the communique has been published to the public no privilege in respect of it can be claimed for the simple reason that after publication the communique is no longer an unpublished official record. For these reasons, I would uphold the order of the learned trial Judge and dismiss this revision petition. In the circumstances of the case, I leave the parties to bear their own costs. Parties to appear in the lower Court on the 12th November 1945.

V.W./D.H.

Petition dismissed.

[Case No. 89.]

A. I. R. (33) 1946 Lahore 462

TEJA SINGH J.

Mahant Baldeo Dass

v.

Malik Dharem Chand.

First Appeal No. 80 and Appeal No. 111 of 1945, Decided on 28th January 1946, from order of Senior Sub-Judge, Multan, D/- 13th March 1945.

(a) Civil P. C. (1908), O. 40, R. 1 and O. 43, R. 1 (s) — Orders under O. 40, R. 1, cls. (b) (c) or (d) if passed after order under cl. (a) appointing receiver can be appealed against separately.

Though the orders contemplated by sub-cls. (b), (c) and (d) of sub-r. (1) of O. 40, R. 1 are incidental to the main order which the Court may pass under cl. (a) appointing a particular person a receiver of a property yet it is possible to think of cases where the Court at first merely passes an order of the appointment of a receiver and reserves further orders of removing a person in possession or conferring powers upon the receiver for a further occasion. If such an order is subsequently passed it can be appealed from separately: (20) 7 A. I. R. 1920 Pat. 703, *Rel. on.* [P 463 C 2]

C. P. C. —

('44) Chitaley, O. 40, R. 1, N. 51.

('41) Mulla, Page 1149 Note 'Appeal.'

(b) Civil P. C. (1908), O. 40, R. 1 and O. 43, R. 1 (s)—Order directing notice to show cause why receiver should not be appointed—Order not appealable.

Where an application for appointment of a receiver is made by a party to a suit, an order directing notice to issue to other party to show cause why a receiver should not be appointed is not appealable. [P 463 C 2]

C. P. C. —

('44) Chitaley, O. 40, R. 1, N. 51.

('41) Mulla, Page 1149 Note 'Appeal.'

(c) Civil P. C. (1908), S. 11—Order appointing receiver during pendency of suit—Appeal against, dismissed — Order cannot be challenged subsequently.

Where an appeal from an order appointing a receiver during the pendency of a suit is dismissed, the legality or propriety of the order appointing a receiver cannot be reagitated in a subsequent appeal against an order granting delivery of possession of the property to the receiver. [P 464 C 1]

C. P. C. —

('44) Chitaley, S. 11, Notes 21 and 22.

(d) Civil P. C. (1908), O. 40, R. 1, sub-r. (1) (d) and O. 43, R. 1 (s) — Order granting sanction to lease granted by Receiver is not appealable.

An order granting sanction to a lease granted by the Receiver is merely a routine order and does not come under O. 40, R. 1, sub-r. (1) (d) and as such is not open to appeal. [P 464 C 1]

C. P. C. —

('44) Chitaley, O. 40, R. 1, N. 51.

('41) Mulla, Page 1149 Note 'Appeal.'

Nand Lal Salooja — for Appellant.

Shamair Chand — for Mehta Chunilal

(Respondent.)

S. N. Chopra — for other Respondents.

Judgment.—This appeal and Appeal No. 111 of 1945 are connected and will be disposed of by one order.

[2] The facts briefly stated are as follows: On 13th February 1945, a number of Hindus of Multan City brought a suit under S. 92, Civil P. C. against Bawa Baldev Das, who claims to be the trustee and the Mahant of Suraj Kund Asthan, for his removal from the office of the trustee and the Mahant, for the appointment of a new trustee and a Mahant, for rendition of accounts and for settlement of scheme for the proper management of the Asthan etc. The plaintiff's alleged *inter alia* that the defendant was misusing his position and mismanaging the Asthan and the property attached thereto. On 27th February 1945, the plaintiffs made an application for the appointment of a Receiver of the Asthan and of the moveable and the immovable property belonging to the Asthan. On 13th March, the Court after hearing the appellants' counsel passed an order directing a notice to issue to the defendant to show cause why a Receiver should not be appointed. At the same time it issued an *ad interim* injunction to the defendant restraining him from alienating any property till the disposal of the application for the appointment of the Receiver. The defendant appeared on 16th April 1945, and put in objections. After hearing the counsel for both sides the Court appointed the Official Receiver, Multan, and one Mr. Asa Nand, Pleader, as joint Receivers. The concluding words of the order are as follows:

"Having regard to all the facts placed before the Court I am of opinion that it is a fit case in which a receiver should be appointed during the pendency of the suit for the agricultural land and other property of the Asthan. I appoint Diwan Ram Chand Official Receiver and Malik Asa Nand Pleader, Multan, joint receivers. The receivers shall take possession of the moveable and immovable property of the Asthan and keep regular accounts of the income and expenditure. Out of the income they would pay to the defendant the expenses on this litigation as well as for his own maintenance and other necessary attendants of the Asthan with the permission of the Court. Their remuneration will be determined after taking into consideration the amount of income of the property and the quality of work."

[3] Certain other orders were passed by the Court on 4th May and 24th May 1945. This appeal is directed against orders of 13th March 1945 and 4th May 1945, while the order of 24th May 1945 is the subject-matter of the other appeal.

[4] A preliminary objection has been raised by the respondents' counsel that the

appeals are not competent. The appellant's learned counsel contends that the orders appealed from are covered by cl. (d), sub-r. (1), R. 1 of O. 40, Civil P. C., and they are appealable by virtue of O. 43, R. 1, cl. (s) which lays down that an appeal will lie *inter alia* from an order under R. 1 of O. 40.

[5] The wording of sub-r. (1) is as follows:

"Where it appears to the Court to be just and convenient, the Court may by order:

(a) appoint a receiver of any property, whether before or after decree;

(b) remove any person from the possession or custody of the property;

(c) commit the same to the possession, custody or management of the receiver; and

(d) confer upon the receiver all such powers, as to bringing and defending suits and for the realization, management, . . . of the property, the collection of the rents and profits thereof, the application and disposal of such rents and profits and the execution of documents . . . , or such of those powers as the Court thinks fit."

[6] It may be argued that the orders contemplated by sub cls. (b), (c) and (d) of sub-r. (1) are incidental to the main order which the Court may pass under cl. (a) appointing a particular person a receiver of a property, but it is possible to think of cases where the Court at first merely passes an order of the appointment of a receiver and reserves further orders of removing a person in possession or conferring powers upon the receiver for a further occasion. The question is whether and if such an order is subsequently passed can it be appealed from separately or not? On giving careful consideration to the matter, I am inclined to think that the answer to the question must be in the affirmative. I am confirmed in this view by the observations made by Sultan Ahmad J., in 55 I. C. 15.¹ The learned Judge said:

"Order 40 relates to the appointment of Receivers and appeals are provided under O. 43, R. 1 (s) only against orders under R. 1 or R. 4 of O. 40 . . . Rule 1 refers to the appointment of Receivers, that is, all that happens at the time when the receiver is appointed. If the appointment itself is challenged or anything relating to the appointment, as for instance the powers which may be conferred upon the Receiver, in that case an appeal will lie."

[7] But the trouble in the present case is that none of the orders from which appeals are preferred comes within the ambit of the different clauses of sub-r. (1). The order of 13th March, as I have already remarked, was to the effect that notice be issued to the defendant. Mr. Nand Lal himself concedes that this order did not give him any right

1. (20) 7 A. I. R. 1920 Pat. 703 : 5 Pat. L. J. 97 : 55 I. C. 15, Samhutta Singh v. Bhagwati Singh.

to appeal. As regards the order of 4th May 1945 it was argued by Mr. Nand Lal that it related to the agricultural land that was recorded in the revenue papers in the defendant's own name and the Asthan had absolutely no concern with it. He further argued that by taking away this land from the defendant's possession and making it over to the Receivers, the Court virtually prejudged the defendant's case. This may be so, but the order for the appointment of the Receiver having already been made on 16th April 1945, the order in question merely gave effect to it. As the perusal of the Sub-Judge's order dated 16th April 1945, appointing the Receivers would go to show the object of the appointment of the Receivers was to protect the property, which the plaintiffs claimed to be the property of the Asthan and I believe that in the face of that order Mr. Galooja's contention that the land, of which the defendant was described as the sole owner in the revenue papers, should have been excluded from its operation, is without any force. However this is not a matter with which we are concerned for the present, because the defendant's appeal from the order appointing the Receivers was dismissed by this Court some time ago and the advisability and the legality of the order of 16th April 1945 cannot be reagitated now. I may also point out that the defendant raised no objection to the delivery of the possession of the agricultural land to the

Official Receivers before the trial Court. On the other hand it is clear from the order of the Court that in the statement that the defendant's own counsel made on 4th May 1945, he said that the defendant had no objection in surrendering possession of the immovable property in the capacity in which he was in possession. He even went further and said that possession had already been surrendered to the Receivers.

[8] The order of 24th May 1945 concerns the grant of lease of the agricultural land for a period of two years for a sum of Rs. 24,000. The Court was of the opinion that the best price for the lease had been obtained and accordingly sanctioned the lease. In my judgment it was only a routine order and does not come within the scope of cl. (d), sub-r. (1), R. 1 of O. 40 and as such it is not open to appeal. In 35 Cal. 568² it was held that directions given by a Court in passing receiver's accounts are not appealable.

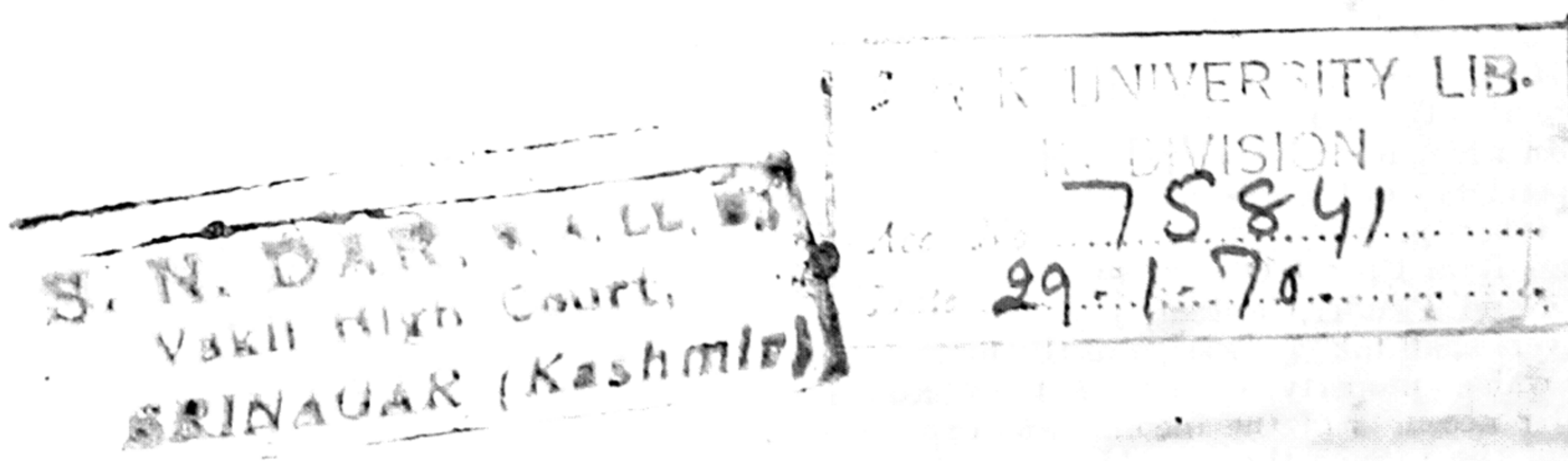
For all these reasons the appeals must fail and are dismissed with costs.

K.S./D.H.

Appeals dismissed.

2. (10-2) 35 Cal. 568, Rani Keshabati v. W. O. Mac-Gregor.

END



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